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ABSTRACT

This guide presents practical steps to improve the school environment and to minimize the legal liability of educators. It provides strategies and techniques for discipline and safety, documentation, dealing with harassment, gang activities, physical violence, off-campus problems affecting school environment, issues concerning special education students, life away from school, and the giving of testimony in court. Although the guide is intended to create a safer school environment, it is not meant to take the place of specific legal advice. Three appendixes cover definitions and explanations of the legal system and constitutional rights, the giving of testimony in court and dealing with attorneys, and the receiving and giving of gifts and money to and from students. (Contains 38 references.) (DFR)

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# An Educator's Legal Guide to *Stress-Free* Discipline and School Safety

by Lawrence Mazin, Ed.D.,
John Hestand, J.D., and
Ruth Koester, J.D.

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# An Educator's Legal Guide to Stress-Free Discipline and School Safety

Lawrence E. Mazin, Ed.D.

John T. Hestand, J.D.

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NES

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Bloomington, Indiana 1998

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# Dedication

To the hardest working and most dedicated people in America—the teachers and administrators of our education system.

# About the Authors

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# Disclaimers

The strategies and techniques contained in this book are general guidelines and are intended to provide you with sound legal strategies for handling student disruption and violence. Nevertheless, laws governing student discipline vary from state to state and are constantly being amended, revised, and interpreted by the courts. Therefore, you are encouraged to seek professional legal counsel on specific issues.

The opinions and strategies contained in this book are those of the authors and do not represent the opinions of the Office of the Arizona Attorney General.

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# Introduction

Our society is faced with very real, complex, and serious problems. Abuse and neglect, harassment, gang activity, and violence are just a few of the problems that do not stop at the schoolhouse door. These problems permeate our public and private schools at all levels in both urban and rural areas. Any school that claims it does not have any of these problems is living a very dangerous dream from which it may awaken to find vandalism, sexual harassment, or the serious injury or death of students or faculty members.

Although schools and teachers cannot solve many of the problems that plague society and our students, we can take practical steps to reduce their incidence and severity in the school environment. We can also take practical steps to minimize our legal liability as we address these problems. As an educator, it is in your best interest to know how you can make your classroom and school a safer place. You also have legal, ethical, and moral obligations to use what you learn to minimize or prevent such problems in the future.

*An Educator's Legal Guide to Stress-Free Discipline and School Safety* presents in clear, simple language practical steps for improving the school environment and minimizing your legal liability. Organized as a reference you can use for help with specific problems, *An Educator's Legal Guide to Stress-Free Discipline and School Safety* provides proven strategies and techniques for:

- planning for discipline and safety,

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- arming yourself with the sword and shield of documentation,
- minimizing your legal liability when you discipline students,
- identifying and responding to harassment,
- identifying and responding to gang activity,
- handling incidents of physical violence,
- responding to off-campus problems that affect the school environment, and
- giving testimony on the witness stand.

*An Educator's Legal Guide to Stress-Free Discipline and School Safety* enables you to act decisively to minimize your legal liability and maximize the safety of your students, staff members, and facilities. Although this guide will help you create a safer school environment, it is not intended to take the place of specific legal advice. Always seek assistance from your school's administration and lawyer, your educational association and its legal staff, and/or private legal counsel for advice on handling specific situations.

# Self-Evaluation

The legal issues involved in handling many situations at school help define how an educator should—and should not—respond. Take a few moments to complete the following self-evaluation. How would you handle the following situations?

1. As I leave school at 4:45 P.M., I notice that one of my students has missed the last bus. I know he lives near my neighborhood. Is it appropriate for me to give him a ride home?
   a. Yes. I've taken this student and my son to the mall on Saturdays.
   b. No. I would not feel comfortable transporting a student in my personal vehicle.
   c. No, unless the weather is bad. To leave a student standing in the pouring rain would not enhance a student-teacher relationship.

2. I am concerned about increased violence in my school. Can I carry a weapon or a pepper-spray device for self-defense?
   a. Yes, as long as I keep it in the glove box of my car.
   b. No, unless I plan to work after hours when there are few or no people around.
   c. No, I should not carry anything that may be used as a weapon.

3. A student tells me she thinks another student took her five-dollar bill. Can I search the room, the desks, the lockers, and the students to find the missing money and the thief?
   a. No. I should contact the administration to handle the problem.
   b. Yes. This is a minor problem, and the student expects me to help her.
   c. No. This student is responsible for her own money. She should have kept it safe.

4. A student has brought a prohibited item to class. May I confiscate it? Must I return it?
    a. No. If anything happened to the item, such as damage or theft, I could be liable for its cost.
    b. Yes, but I do not need to return dangerous items.
    c. Yes. I can take the item and not return it until a parent signs for it.

5. The parents of one of my students have asked me for information on another student in my class. May I give them information about the other student?
    a. No, unless it is for social reasons. Too many times a student is not invited to parties simply because the birthday boy or girl did not have the student's address and phone number.
    b. No, but I can direct the parents to a member of the administration.
    c. No, but I can let the student know that the requesting parents want information about him and tell him to give it out.

6. After a student made me promise not to tell, he told me he is contemplating suicide. What should I do? Should I respect my promise or should I notify someone?
    a. I should respect my promise. It is important that this troubled student be able to trust me to keep my word.
    b. No further action is necessary. The fact that the student is willing to talk about his suicidal feelings indicates that he is feeling better and would not do such a thing.
    c. I should do what I can to help the child. That may include contacting the administration and the child's parents.

7. I believe one of my students is being physically abused or neglected. What should I do?
    a. I should contact child protective services immediately and request an investigation.
    b. I should not do anything. My job is to teach, not to get involved in my students' lives away from school.
    c. I should call the student's parents and confront them with my beliefs.

8. I offer a tutoring service. Is it appropriate to tutor one of my own classroom students for a fee?
    a. Yes. If my own students needed extra help, they would have to pay for it.
    b. Yes, but I would give my own students a discounted rate.
    c. No. I would refer my own students to another teacher who might be willing to tutor them.

9. May I talk to my students about sex, politics, and/or religion?
    a. No. If a question involving one of these topics came up during class time, I should change the subject.
    b. Yes, but only if the topic directly relates to the curriculum and only during class time.
    c. Yes, as long as I do not discuss these topics during class time and do not give my personal opinion on an issue.

10. One of my students does not have money for lunch or the field trip today. Is it appropriate for me to lend or give money to a student?
    a. No, I do not lend money. If a student needs money for lunch or a field trip, usually other students have enough money to lend a dime or nickel here and there.
    b. Yes, I always give students lunch money if they need it. It is hard to learn when your stomach is empty. If it happens frequently, I call or write a note home.
    c. Yes, I always give students money for a field trip. I would not want them to miss the experience.

## How Did You Do?

The 10 scenarios described above are just a few of the situations you are likely to face as an educator. *An Educator's Legal Guide to Stress-Free Discipline and School Safety* provides you with advice you can use to navigate your way through these and many other problems. The best legal option for each of the 10 situations is identified on the next page.

## Answer Key:

1. b. To avoid any personal liability, you should not transport students in your vehicle.
2. c. Carrying a weapon in a school may be considered a criminal offense.
3. a. Issues of search and seizure are best left to the administration to resolve.
4. b. Potentially dangerous items, such as weapons or drugs, should be confiscated from students.
5. b. Federal law lists the entities or individuals who are allowed access to these records. The only parents who are allowed a right to information on a student are that student's parents. Either you or a member of the administration can explain this to other parents.
6. c. You have a legal obligation to take the necessary steps to protect the child.
7. a. Most states have legal requirements that compel teachers to report suspected abuse to the police or child welfare agencies.
8. c. Tutoring your own students and receiving money for doing so creates a potential conflict of interest and should be avoided.
9. b. In a classroom setting, within the confines of an approved curriculum, selected issues in these areas can be taught in a way that neither advocates nor exploits the issues.
10. a. Do not lend or give money to students because they may misconstrue your intentions. Your school should develop a fund for such emergencies. Any school-sponsored field trip should be free for the students.

Without an understanding of the legal issues involved in each problem, you may find yourself relying on intuition, previous experience, and your best intentions. Unfortunately, taking action—or choosing inaction—based on these three human tendencies can create even more serious legal problems for you and your school. *An Educator's Legal Guide to Stress-Free Discipline and School Safety* will give you an in-depth understanding of the legal issues involved in these and many other problems.

And because solving problems is not nearly as effective as preventing them from occuring, *An Educator's Legal Guide to Stress-Free Discipline and School Safety* begins with three practical sections on planning for discipline and safety, understanding effective discipline, and explaining effective documentation. The guide also includes a brief outline of the legal system and strategies for being a witness in a hearing or trial, should you become involved in disciplinary or legal action.

# PART 1

# Planning for Discipline and Safety

Chapter 1-1 Educational Planning

1-2 Enforceable Rules, Enforceable Penalties

1-3 Judicial Challenges

1-4 Prohibition of Non-School Activities

Case Study Transporting Students in Your Personal Vehicle

## Chapter

## 1-1

# Educational Planning

Developing a plan for discipline and safety is one of the most important steps you can take to minimize discipline and safety problems and to maximize your legal protection when handling such problems. Appropriate planning provides a methodical, fair, and inclusive way to develop school rules and discipline policies. The more methodical, fair, and inclusive your plan is, the more likely it will result in legally defensible rules and policies that will meet your school's particular needs.

When we consider the potential for violence and disruption in the school system, it is imperative that we remember the Boy Scout motto: "Be prepared." If we wait until a problem has surfaced, we have guaranteed that we are too late to prevent the problem—and we may be too late to attack the problem effectively. The time to prepare for weapons on campus is not while you are staring into the barrel of a pistol in the hands of an angry, irrational student.

## A Balancing Act

Effective planning for discipline and safety is a balancing act between involving all participants and taking responsibility for the final product. Classrooms and schools are neither dictatorships nor are they exercises in classic Greek democracy in which every citizen has an equal voice. Classrooms and schools are institutions charged with educating children and doing so in the most effective manner possible. Meeting this obligation involves

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*The time to prepare for weapons on campus is not while you are staring into the barrel of a pistol in the hands of an angry, irrational student.*

balancing the need to consider all viewpoints with the need to assume responsibility for the obligation.

A classroom teacher who fails to consider the thoughts and needs of students and parents will likely face resentment and opposition. A classroom teacher who fails to make the final decisions on what will happen in his or her classroom faces almost certain anarchy and disruption. Likewise, a principal who does not seek input and recommendations from faculty, staff, students, and parents cannot be truly effective. A principal who abrogates his or her duties and fails to exercise the authority and responsibilities of the position is even less effective.

Some potential problems are so serious that a principal should insist on immediate safeguards while a more permanent, comprehensive plan is developed. One such problem is the possibility that an adult volunteer may be a pedophile. To minimize the threat and legal liability this possibility presents, a principal should insist on background checks of all volunteers and a program of regular, random, and unpredictable supervision of all volunteers and volunteer activities.

While extensive input from a variety of sources is essential to developing successful plans for handling any complex subject, plans cannot be effectively developed by an entire student body, faculty, or staff of a school district. Although everyone who will be affected by the plan must know that his or her recommendations will be seriously and fairly considered, plans that will affect the entire school or district should be developed by a planning committee that includes representatives from each affected population.

## The Planning Process

Whether the plan is the individual work of a teacher for a classroom or the work of a committee for a school district, effective planning involves six steps:

1. Define the problem.
2. Gather information on the problem.

3. Gather recommendations to address the problem.
4. Develop and finalize a plan to address the problem.
5. Distribute the plan in writing and present it orally.
6. Evaluate and revise the plan as needed.

Define the Problem

**Step 1: Define the problem.** Why are you planning? What is the plan supposed to accomplish or prevent? Skip this essential step and your plan will at best be too broad and involve wasted effort and will, at worst, have nothing to do with the problems you face.

Gather Information

**Step 2: Gather information on the problem.** Information includes facts and opinions. Opinions are essential to the planning process because they reflect how the problem is perceived. An effective plan will include ways to correct mistaken perceptions and address negative, but accurate, perceptions.

Facts include information on actual occurrences: In the last month, there have been eight referrals to the assistant principal for fighting. Last Tuesday, two students were caught on school grounds with guns in their possession. This information can be obtained from discipline records, survey results, and other kinds of documentation maintained by faculty and staff members. (See Part 3 for information on effective documentation strategies.)

Use the five Ws and one H questioning strategy to gather and understand factual information:

- **What** has happened? Have drugs been sold, possessed, or consumed on campus? Has gang-related intimidation occurred on campus? If the perpetrator of an assault was wearing a coat, was the coat a piece of gang clothing or was it worn simply because it was cold on the day of the assault?
- **Who** was involved in the problem? Which groups of students may be more likely to be involved in the problem in the future? If high school students who drive to school are lingering in the parking lot and coming to class late, the plan could restrict driving

privileges for tardiness or have a staff member in the lot to hurry students to class.

- **Where** and **when** has the problem occurred? If six of the last seven fights have occurred in the school courtyard before first period, the plan may need to focus more on location and time than on other factors. If students talk to each other and throw spit wads around the pencil sharpener, then the pencil sharpener may need to be moved closer to the teacher's desk.

- **Why** is the problem occurring? Why might the problem occur in the future? Has there been a change in the school environment or schedule? What factors have contributed to the problem? Are there problems in the community or at home that are contributing to students engaging in problem behavior? Look beyond the symptoms to the cause, and develop a plan that addresses the reason for the problem, not its effects.

- **How** are the behaviors and activities involved in the problem dangerous, disruptive, and unacceptable? Focus on identifying specific elements of the problem that can be addressed in the plan.

Opinions about the problem must also be considered. If there is a community-wide perception that guns are rife in the school, that opinion must be considered—even if only one gun has been found on campus in the last three years. If there is a perception among minority students that the faculty is biased and will not give them an even break, this opinion must be considered—no matter how fair and multicultural the staff may be. These issues may not ultimately be addressed in the plan, but they must be considered.

Seek Input

**Step 3: Gather recommendations to address the problem.** Although honest discussion does not guarantee a plan's success, the lack of it assures a plan's failure. We recommend brainstorming for recommendations within the planning committee and its subcommittees. We also recommend seeking input from as many individuals and groups as possible.

You can always dismiss an idea that is impractical, or even ridiculous, but you cannot consider and implement an idea that is never presented to you for discussion.

If a recommendation from a student, parent, or letter to the editor is a good idea, adopt and implement it. If the student or parent raises a valid concern with an unworkable solution, recognize the concern and find a solution that will work. If the student or parent is sincere but mistaken, take the time to discuss the situation with him or her. If the student or parent is "out to lunch," thank the person for his or her input and give it all the consideration it merits—none.

Seeking recommendations from those who will be affected by a plan, rule, or regulation provides many benefits. First, those who are affected by the problem often have direct insight into problem behaviors and may be able to provide suggestions for effectively controlling those behaviors without causing unnecessary resentment and opposition.

*Involving students and other stakeholders in the development of rules gives them a sense of ownership.*

Second, involving students and other stakeholders in the development of rules gives them a sense of ownership. The more student recommendations overlap with those proposed by adults, the more likely students are to accept the new rules as their own. If we adopt nine of the students' ten recommendations, and add three more of our own, the students have a discipline code which they recognize as being 75% their own work.

Third, seeking recommendations from students and other stakeholders sends a clear message that all input will be considered. In any interaction with others, we are better off trying to reach a win-win solution. If we cannot reach a win-win accommodation on discipline with our students, then we need to consider giving a little in compromise while retaining the core of the solution. If your school can get total buy-in from all students (including gang members) on solutions to three of seven serious problems, then you have three fewer problems and can focus your efforts on finding solutions to the remaining four problems. A partial treaty is always better than total war, and a partial victory is better than an ongoing full-scale battle.

Finally, inviting input from students can break down barriers to communication. When a teacher or a school first asks for input, some students will react with skepticism and cynicism. If there is any reaction at all, it may even be mocking or insulting. This is often a test. If we react in a huff—"Well, I should never have expected anything better from the likes of you!"—that is all we will ever get. If, however, our response is calm and leaves the possibility of future discussion open, there is a real chance that the student may broach a minor issue with us. This improved dialogue may eventually lead to serious and productive discussions in which both sides discuss their mutual needs and reach a compromise that will allow the school and its students to meet at least some of those needs.

Develop and Finalize the Plan

**Step 4: Develop and finalize a plan to address the problem.** Planning is a means to an end, not an end in itself. Be aware of the tendency of planning and committee work to take on lives of their own and actively resist closure. The plan itself must be developed and finalized. This step is achieved by evaluating the information and recommendations gathered and integrating the useful recommendations into a plan that addresses the school's discipline and safety problems. Recommendations should be weighed and evaluated on the basis of four factors:

> **Workability.** Will the recommendation accomplish the goal, in whole or in part? If it will not work, there is no place for it in the final plan.
>
> **Feasibility.** Is it reasonable to expect that the recommendation will be adopted by the governing board, accepted by the students or faculty, and upheld by the courts? If the recommendation is not feasible, there is no place for it in the final plan.
>
> **Practicality.** Is it practical to implant a computer chip into each student's arm so that we know where he or she is at all times? Is there a reasonable cost/benefit balance of monetary and non-monetary expense to the plan? A new school building might help reduce vandalism, but if we cannot get the 50 million dollars

*Consider recommendations based on their*

- *Workability*
- *Feasibility*
- *Practicality*
- *Comparison*

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needed to build the building, the recommendation is not practical and does not belong in the final plan.

**Comparison.** If there are two, three, or four recommendations that will achieve the same results, does one have fewer disadvantages than the others? Does one recommendation produce more than one benefit, or does one recommendation dovetail better with other parts of the plan?

Distribute the Plan

**Step 5: Distribute the plan in writing and present it orally.** The only thing a plaintiff's attorney likes better than a school without a plan is a school with a plan that is not followed. Plans, policies, rules, or regulations accomplish nothing if they are not distributed—and distributed widely. Everyone who has a responsibility or an obligation under the plan should receive a copy of the plan in writing. If teachers have duties and expectations under the school discipline plan, the school safety plan, and the school crisis management plan, they need to know what those duties and expectations are before a disciplinary infraction or crisis occurs. If students are expected to comply with a disciplinary plan, they must know what is mandated and what is prohibited. If students are expected to take specific steps in a crisis—whether the crisis is a fire alarm, a fight with dozens of spectators, or an injury in a classroom—the students need to know what they are expected to do. Obviously, some discretion is needed. Students do not need to have access to the parts of the security plan which describe where master keys and alarm shutoffs are located.

*The only thing a plaintiff's attorney likes better than a school without a plan is a school with a plan that is not followed.*

Evaluate and Revise the Plan

**Step 6: Evaluate and revise the plan as needed.** Recognize that the planning process never ends. Constant evaluation and reformulation are essential parts of effective planning. When the plan has been developed, distributed, presented, and implemented, it must be evaluated to determine if it is accomplishing its desired goals effectively, partially, or not at all. Even the best plan can be improved, and even the most contemporary plan will become outdated with time. All plans require fine-tuning and preventive maintenance. Be honest when you evaluate a plan and do not let pride, weariness, or fear get in the way of a major overhaul or replacement, if either is needed.

## Chapter
## 1-2

# Enforceable Rules, Enforceable Penalties

Common sense, basic efficiency, fundamental fairness, and the United States Constitution require that school districts have rules of conduct and enumerated consequences as a precondition of an enforceable disciplinary system. At the most basic level, schools must have clear, defined, and communicated rules of behavior.

Students can hardly be expected to do something if they have not been told what they must do. If the teacher wants a 20-page report on Rome by October 15, it is inefficient to fail to mention this requirement to the class. Rules, requirements, and expectations should never be secrets. It is simply not fair to punish someone for doing something he or she reasonably did not know was prohibited. If I am not told that class starts at 7:45 A.M., it is hardly fair to punish me when I show up at 8:00 A.M.

The critical nature of public education, and the absolute necessity of fairness in the provision of it was explained by the United States Supreme Court in *Brown v. Board of Education* (1954):

> *Today, education is perhaps the most important function of state and local governments. . . . It is required in the performance of our most basic public responsibility. . . . It is the very foundation of good citizenship. . . . It is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an*

> *opportunity, where the state has undertaken to provide it, is a right which must be made available to all* on equal terms. *[emphasis added]*

*If a behavior is not disruptive to education or does not present a danger to the individuals in our school, why would we want to make it the subject of a rule?*

If a state provides public education to its citizens, that right cannot be withdrawn in a way that is arbitrary, capricious, or in violation of basic due process. One of the most fundamental due process rights is the right to know, before you do something, whether it is forbidden and whether you can be punished for your action or inaction. Therefore, every school must have rules, regulations, policies, or guidelines that outline its disciplinary requirements before students can be punished for their acts or their omissions.

This chapter focuses on strategies for developing, communicating, and enforcing a discipline plan's rules and consequences. Specialized requirements for rules which place limits on freedom of speech, expression, or association, such as dress codes and restrictions on gang membership, are discussed in Part 7, Gang Activity.

## Developing Disciplinary Rules

Before you develop rules, you must focus on real issues and decide what you need to mandate or prohibit. Not only are there no benefits to having rules for the sake of having rules, there are active detriments. School rules that are too detailed, too complex, and too numerous will result in faculty and staff members who do not know what the rules require—and how and when to implement them. Rules will be routinely ignored or will be implemented inconsistently and in a discriminatory manner, resulting in disrespect for the entire system. Students will become resentful when they are punished for behavior they did not know was prohibited. Parents will become hostile toward the school when they feel that their children have been treated unfairly. Important misbehaviors will be overlooked, and meaningless infractions will take up disciplinary time.

### Decide What to Prohibit

**Decide what to prohibit.** The first standard for any enforceable system of rules is to decide what behaviors are unacceptably disruptive to the effective operation of the class or school, and which behaviors constitute a danger to the health and safety of staff and students. These behaviors will be forbidden. If a behavior is not disruptive to education or does not present a danger to the individuals in our school, why would we want to make it the subject of a rule?

Focus on Behavior

**Focus on behavior.** Class and school rules must focus on behavior, listing which acts are prohibited and which acts are required. Rules should not focus on personality traits or emotions. A rule that prohibits striking another person or yelling at another person is far more effective than a rule that says you may not act "in an angry manner." Prohibiting an "angry manner" does not really tell me what I can and cannot do. Does a rule prohibiting expressions of anger make it acceptable to hit you if I do it in a calm, dispassionate manner? Likewise, a rule stating that a student is required to perform assignments in class, or turn in required homework, is more effective than one stating that a student "may not be lazy."

Involve the Community

**Involve the entire educational community.** Schoolwide rules should not be developed by a single administrator or a small group of teachers working in isolation. For practical reasons, the initial planning and final drafting should be done by a small group. Some schools have used a planning committee comprised of representatives from all groups within the school community. Larger schools may benefit from forming a subcommittee for each group and having the chair of each subcommittee serve as a member of the planning committee.

Between the initial planning and the final draft, however, wide input should be sought as to what behaviors should be prohibited or required, how the rules should be worded, and what the consequences should be for failure to comply with the rules. Suggestions should be solicited from all of the faculty and building-level administrators.

The input of the paraprofessional and classified staff members is often overlooked when rules are developed. These school employees often have insights into trouble areas and can provide valuable suggestions for addressing these problems. If fights at the foot of the west stairway are a common problem, for example, your custodial staff may have suggestions on how to reduce the crowding that frays tempers or on how to patrol the area to pick up the students who use the crowd to cover their planned rule violations.

Students are also commonly overlooked when rules are developed, yet it is their safety and their education which rules seek to protect—and they will be affected the most by the rules. Include students and their parents in the rule development process.

There are important advantages to seeking input from those within and affected by the school community before developing final rules. First, you never know where a really good idea may come from, and it is ineffective to exclude entire categories of people who may have excellent insights. Second, compliance and support increase significantly if people know that they had some input into developing the rules.

Consult with Care

**Consult, but do not abdicate.** Consulting with others does not mean abandoning your own professional knowledge and experience. When you consult with others, you sincerely listen to and implement any suggestions that advance the purpose of the rules. For example, effective consultation has occurred if the school adopts a five-minute passing period when the students persuade the faculty and administration that three minutes do not allow enough time to get from one class to another. If, however, the students suggest 55-minute passing periods and five-minute classes, the school is free to say "thank you, but no thank you."

Consider Abilities

**Consider your students' abilities.** Only implement rules that the students have a reasonable ability to obey. If a class rule requires first-graders to sit still for three hours and listen to a lecture, prepare to impose a lot of discipline because compliance is not physically possible. A rule that prohibits students from necking and petting on campus or from sexually harassing one another is reasonable. A rule which prohibits adolescents from flirting cannot reasonably be obeyed.

Borrow and Modify

**Borrow and modify.** Avoid reinventing the wheel by reviewing other schools' policies, procedures, handbooks, checklists, and additional materials that address your concerns. You can often modify these materials to meet your particular needs by eliminating provisions that are not needed or would not work in your school, adding provisions required by your particular needs, and modifying the language of the remaining provisions to fit your situation. It is much easier to tailor a policy than to create one out of whole cloth. Once you have developed the rules, be willing to share your documents with other schools.

The classroom teacher should also borrow class rules from other teachers in corresponding grade levels and class compositions at their school and in other schools. For example, consider having all the fourth-grade teachers get together to coordinate rules so that they are consistent from class to class.

Seek a Legal Review

**Seek a legal review.** Before implementing rules at the school level, have them reviewed by the district's legal counsel to ensure that they comply with state and federal requirements and are consistent with governing board policies. We do not recommend that you have attorneys write your rules. Attorneys are not educators and do not know your school's needs or what might work most effectively from an educational standpoint. Conversely, an educator is not a lawyer. Without a legal review of your rules, you could inadvertently include wording or requirements that would subject the rules to successful challenge and your school to liability for damages.

Be Clear and Specific

**Be clear and specific.** It is normally more effective to tell a student what to do, rather than what not to do. A rule should be as short as possible, but as detailed as necessary to ensure it is understood. Rules must be fair, reasonable, and within the capacity of the students to obey. If a rule does not reasonably explain the behavior that is to be required or prohibited, it will be subject to legitimate legal challenge. If the punishment does not relate to the offense, a legal challenge could succeed. Whenever possible, the deterrent or punishment in the rule should be a natural and logical consequence of violating the rule.

### Include Catch-All Provisions

**Include catch-all provisions.** As we mentioned earlier, a school generally cannot discipline a student for conduct that is not prohibited in a communicated rule. However, there are some limited exceptions to this restriction. If the behavior is extremely serious, and the courts determine that any reasonable student would know that the behavior was prohibited, even in the absence of a rule, then the courts have upheld punishment. Common examples include actions involving the school that are not specifically covered by school rules, but which constitute felonies under state law. Thus, a school would still be allowed to conduct an expulsion hearing for a felony even if the school rules did not specifically prohibit murder on campus.

*Thus, a school would still be allowed to conduct an expulsion hearing for a felony even if the school rules did not specifically prohibit murder on campus.*

After listing specific prohibitions, which may include rules on the abuse of staff, bus violations, and tobacco, many schools also include a general prohibition, such as:

> Reasonable standard of "Right and Wrong": Other behaviors that a reasonable person would consider to be wrong.
>
> *and*
>
> Violation, in a school setting, of any federal, state, or local criminal code.

### Specify Consequences

**Specify the minimum and maximum consequences.** We recommend that student discipline rules be developed with minimum and maximum consequences for the first occurrence and for repeated occurrences. There are some offenses that are so serious, a recommendation for expulsion is warranted as the minimum consequence for the first event. If a student brings a machine gun to campus and attempts to shoot his homeroom teacher, progressive discipline does not require an oral warning and a parent conference. This event is serious enough to merit permanently removing that student from your school district. On the other hand, failure to bring a pencil to class will never be the basis for expulsion, even if it happens 50 times. Having a minimum and a maximum consequence provides guidelines which help eliminate arbitrariness without eliminating the need to consider individual circumstances. Separating the minimum and maximums for first and repeated offenses also recognizes that repeated misconduct has a cumulative impact on the school's operations, thus justifying greater penalties for repeated offenses.

Review and Revise

**Review and revise.** Once rules are developed, they are not static. Unlike the Ten Commandments, rules are not and should not be engraved in stone. Rules should regularly be reviewed and revised when necessary. After a rule is developed at either the school or the classroom level, it must be evaluated to determine whether it is accomplishing the desired objective. "We have always done it that way" is not an adequate basis for a rule. If the rule and/or the consequence is not working, then change it and see if a different rule or a different consequence is more effective. Conversely, remember that "if it ain't broke, don't fix it." If the prohibited behavior has diminished almost to the point of extinction, the relevant rule and its consequences are clearly effective and should remain as they are.

*"We have always done it that way" is not an adequate basis for a rule.*

Classroom rules should also be evaluated regularly. Think about the class climate at regular intervals. Are the rules working? Are students performing the assigned tasks? Is the class relaxed but orderly? If the class is stifled and nonresponsive, your rules may be too strict. If the class is out of control, your rules may be too loose. If rules are not working, change the discipline and/or the rules and try again.

## Communicating Disciplinary Rules

Communicate and Explain

**Communicate and explain.** Having clear, effective, fair, and reasonable rules is wonderful—unless nobody knows about them. Rules must be communicated to the students who are subject to their provisions. Class rules should be discussed in class and then posted in a prominent place in the room. Consider having students explain the rules or even engage in role play of the rules. You may want to review the rules periodically, and you will clearly want to review the rules if there is a class-wide disruption. School rules should be distributed in writing to each student and should then be discussed either in homeroom classes, assemblies, or another gathering.

Teachers will also benefit from having new rules, procedures, skills, or ideas presented in workshops and in-services which explain the new requirements in different ways. Interaction between the presenter and the audience and, more important, between the teachers and staff who will be implementing the new rules or techniques is beneficial.

Document to Protect

**Document to protect.** It is important to remember the old saying that "just because you're paranoid, it doesn't mean that someone isn't out to get you." As a classroom teacher, document when you discuss and explain the class rules in your lesson plans, on a desk blotter, in a personal calendar, etc. If a student was absent on that day, cover the rules with him or her individually later and document that you did so. For schoolwide policies, records should be kept of the day that the student handbooks were distributed and who was present on that day, with specific and documented delivery later to students who were absent. If a student transfers into your class or your school, provide and explain the rules as a part of the registration and orientation process and document that you did so. This caution eliminates the "nobody ever told me" defense. You have proof that the student was given the rules, that they were discussed, and that the student was given an opportunity to ask questions.

## Enforcing Disciplinary Rules

Enforce Consistently

**Enforce consistently.** Having developed and communicated the rules, we must now face the certainty that someone is going to break a rule. From a legal standpoint, if you fail to enforce your own student discipline rules *consistently,* any disciplinary action you do take can be overturned, even if your school rule was legally required by a state or federal mandate. There are three simple touchstones for enforcing rules at either the classroom or the building level: be fair, be firm, be consistent. Rules need to be enforced in a strict and evenhanded manner.

Enforce Fairly

**Enforce fairly.** Problems will abound if school rules are enforced in an arbitrary or inconsistent manner. Children are particularly attuned to unfairness, and this becomes critical if the treatment really is unfair. Inequity and inconsistency will undercut future rule enforcement and will reduce educators' credibility with the mainstream students as well as with the rule violators.

Protect Student Dignity

**Protect the student's dignity.** Correct the behavior and try to avoid humiliating the student. Focus on the student's behavior instead of on labeling the student. Tell a student she violated the rule on talking out in class. Do not tell her that she is a loud-mouthed troublemaker. When possible, praise publicly and correct confidentially. Reward students when they comply with the rules, rather than simply disciplining them when they fail to comply. When enforcing a rule, review its purpose with the student. Provide students with multiple ways of receiving teacher praise and peer recognition. Make it easy for the student to want to obey. A student would rather be perceived as bad than stupid. If the only option is embarrassment because there is no positive recognition, a student is likely to either act out or withdraw. Neither alternative is acceptable.

*There are three simple touchstones for enforcing rules at either the classroom or the building level:*

- *Be fair.*
- *Be firm.*
- *Be consistent.*

Consider the Circumstances

**Consider legitimate extenuating circumstances.** Although consistency is very important, it is also important to remember that "a foolish consistency is the hobgoblin of little minds." This quote from Ralph Waldo Emerson reminds us to consider legitimate extenuating circumstances. If two children are in a fight at school, one for the first time and one for the tenth time, it is not inconsistent to have different consequences for each child. If two students miss class on the same day—one because he went to the mall and the other because she stopped at an accident site on the way to school and saved a child's life—you could reasonably decide that there would be a consequence for the first ditch and no punishment for the second, even though it did not technically meet the requirements of an excused absence.

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## Chapter

## 1-3

# Judicial Challenges

Four factors play a significant role in determining whether a judicial challenge to a rule will succeed or fail: reasonableness, vagueness, overbreadth, and equal protection.

## Reasonableness

Judicial challenges to the rules themselves will generally fail as long as the rules are reasonable. Courts give wide discretion to schools in creating their own rules and in determining what behaviors interfere with the effective provision of educational services to students. The courts will look to the reasonableness of the overall rule and will recognize the important and legitimate state interest served in preventing disruption to or interference with the educational process.

## Vagueness

The most successful challenges to a school's rules come when a rule is unconstitutionally vague. As we discussed earlier, you cannot punish a person for something that he or she reasonably could not have known was prohibited. Thus, if you develop a rule but do not communicate it, do not attempt to discipline a student who breaks that rule. Similarly, if a reasonable person reads your rule and cannot determine what behavior is subject to discipline, that vagueness has the same impact as a rule that is not communicated. Whether an action is prohibited and subject to

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*The most successful challenges to a school's rules come when a rule is unconstitutionally vague. You cannot punish a person for something that he or she reasonably could not have known was prohibited.*

punishment has to be understood by someone other than the assistant principal.

## Overbreadth

A school rule may also be subject to legitimate constitutional challenge if it is overly broad. An overly broad rule prohibits more than is required to meet the legitimate purpose for the rule and, thus, interferes with a legitimate right of the person who is subject to the rule. The concerns here are that the individual might feel compelled, because of the rule, not to do something that he had a legitimate right to do, and/or that the rule would be subject to selective enforcement, particularly on the basis of race, gender, or ethnic origin.

## Equal Protection

If school rules are enforced without a recognizable rhyme or reason, a court may very well overturn or reverse an imposed discipline. This is particularly true if there is a pattern of discriminatory enforcement, with harsher penalties given to particular racial or ethnic groups than to the student body as a whole.

## Chapter
## 1-4

# Prohibition of Non-School Activities

School rules set up consequences for performing or failing to perform behaviors that have a school connection. A student fight on school grounds during the school day is clearly subject to school jurisdiction. Students who fight on a school bus traveling to an away softball game are clearly involved in a school-sponsored activity and, therefore, are subject to school jurisdiction. A student who comes onto the school grounds at midnight to break windows is also subject to school jurisdiction. However, if a student goes to a nearby town on a Saturday night and gets in a fight with someone from that town, there is no school connection that would justify a decision to suspend or expel the student.

## Reasonable Connection of Non-School Conduct

The question of whether a school can regulate a student's behavior away from school and at times other than the normal school day becomes a question of reasonableness. Is there a reasonable connection between the misconduct and the school that justifies the school's decision to impose consequences?

The courts have been very supportive of school-imposed consequences when the student's off-campus behavior endangers other students for whom the school continues to have responsibility. A classic case involved two students who left school, went home, got in their parents' car, and played chicken with a loaded school bus. Even though they had clearly left the jurisdiction of the school and returned to the jurisdiction of their parents, the behavior was so serious in its impact on the school as to justify long-term suspensions.

*The courts have been very supportive of school-imposed consequences when the student's off-campus behavior endangers other students for whom the school continues to have responsibility.*

It is also very likely that the courts would uphold discipline for a student whose non-school day, off-campus misconduct was directed at a school employee because the person was a school employee. Thus, a student who assaults a teacher at the local mall or who goes to the teacher's house to slash the tires on the teacher's car is subject to school discipline as well as criminal arrest. But if the student is committing five burglaries in the neighborhood and unknowingly selects his teacher's house as one of the five, the courts would be less likely to uphold school punishment because the behavior was not motivated by the student's connection to the school.

A school can also reasonably regulate student behavior if the student leaves the school grounds at lunch or at other times during the normal school day to engage in behavior that violates a school rule. Thus, if the school prohibits smoking, and the student leaves campus to smoke in a park across the street, the behavior can still be disciplined. If two students have words on campus and agree to cross the street to "duke it out," the behavior may still be disciplined. If a student leaves campus at noon to rob the local convenience store, a school can probably discipline.

Schools may consider adopting a "Good Neighbor Policy," such as the following:

> School rules and other reasonable expectations for student behavior are extended to include student conduct while going to and from school and while off campus during the normal school day. This includes the responsibility to act as a good neighbor, respecting the safety, welfare, and property of others during lunch hour and released periods. Failure to act as a good neighbor within the school community may result in disciplinary action.

Nevertheless, courts have rejected efforts by schools to adopt study curfews, which would prohibit students from being on the streets from 7:00 P.M. to 9:00 P.M., to increase the likelihood of their students studying at home. Such efforts have been viewed as a usurpation of parental authority and have not been granted to the school board and teachers. However, courts have upheld curfews that are aimed at child safety and health. City or county curfews that prohibit children from being on the streets from midnight until 5:00 A.M. would likely be upheld. To the best of our knowledge, schools have never been granted this type of authority.

## Reasonable Penalties for Non-School Conduct

An additional element of reasonableness that would be examined by the courts is the balance between the severity of the misconduct and the form or severity of the punishment to be imposed. If the only penalty to be imposed on the student is the withdrawal of a privilege, such as the right to be on the football or volleyball team, courts have traditionally given wide latitude to the school to enforce a wide pattern of off-campus behavior. Courts have upheld excluding students from participation in extracurricular sports because of non-school day, off-campus drug or alcohol use or because of antisocial behavior such as being in fights or convicted of theft, even though the fight or theft did not involve the school, its pupils, or personnel.

# Case Study

## Transporting Students in Your Personal Vehicle

**You are leaving the school at 4:45 P.M. when you see that one of your students has missed the last bus. You know he lives near your neighborhood. Is it appropriate for you to give him a ride home?**

No. People who choose education as a profession tend to be self-giving and child-oriented. However, some generous instincts can place both the teacher and the school in danger of legal liability. There are a number of potential legal difficulties that suggest that as a teacher you should never transport a student in your private vehicle. Of course, exceptions include transporting your own children or children who are in your vehicle for a clearly non-school-related purpose, such as members of a T-ball team you coach, members of your Sunday school class, or friends of your child who are going on a family outing with your child.

**The first reason for not transporting a student in your own vehicle is to avoid personal liability, should the child somehow be injured.** If your vehicle is involved in an accident, and the child is injured, it is almost certain that you will be named in the lawsuit, whether or not the accident is your fault. Attorneys tend to name every potential "deep pocket" with the hope that they can collect some money from any or all sources. In addition, it is almost certain that the school will also be named in the lawsuit, with the argument that you were acting as the agent of the school. As a result, many school districts have policies specifically prohibiting school employees from transporting students in their personal vehicles.

Liability, in the case of traffic accidents, is based generally on the theory of negligence. Were your actions somehow not the actions of a reasonably prudent person in that particular situation? The attorneys for the injured child and his or her parents will argue that your negligence somehow contributed to or caused the accident: you were exceeding the speed limit; you were distracted, talking to the student; you were reaching for a book that was about to fall off of the seat. Negligence laws vary from state to state, but as a general rule, individuals can be held completely or partially liable if their actions caused the accident or contributed to the occurrence of the accident.

Even if your actions as a driver were above reproach, attorneys will argue that a reasonable and prudent educator would not transport a student in her personal vehicle and that, had you refused to transport the student, the child would not have been in your vehicle in the first place and, therefore, could not have been injured.

In addition, the school will almost certainly be named in a lawsuit because it will have a large insurance policy and tremendous potential assets in the form of its taxing authority. The attorneys for the student will argue that you were acting as an agent for the school when you transported the student and, therefore, the school, as your employer, is liable for your negligence. As you can imagine, this will not please your employer, and you may face school disciplinary action for your negligent or wrongful conduct in transporting the student without specific school authorization or direction.

Not every accident results in a lawsuit. Not every lawsuit ends in liability for the person sued. Many times the individual's personal insurance policy or even the school's insurance policy will pay all of the monetary costs of a lawsuit, including damages and attorneys' fees. However, even if you do not have to pay any money out of your own pocket, and even if you do not lose your job or suffer other job-related consequences, the very act of participating in litigation is unpleasant, time-consuming, and can create significant stress for you and your family.

**A second compelling reason against transporting a student in your personal vehicle is to avoid the potential for claims that you engaged in some type of inappropriate conduct.** Sadly, ours is a society in which children are often victimized by adults. Equally sadly, adults who are not careful about their personal actions can find themselves accused or suspected of improper conduct even when they did nothing that was illegal or immoral and had no wrongful intentions. An adult of either gender who is alone in a personal vehicle with a student of either gender is leaving himself or herself open to false claims of misconduct, misunderstandings, and rumors. Self-protection requires educators to avoid even the appearance of impropriety because rumors or malicious gossip can be harmful or even fatal to a career, no matter how groundless they are.

Schools that do not have policies that prohibit school employees from transporting students in their personal vehicles should seriously consider adopting such policies to protect both the teachers and the school from the potential problems listed above. Having a formal policy to refer to will also make it easier to turn down a request to "give me a ride to the mall" without appearing to be inconsiderate. If your school does have such a policy, failing to follow it can subject you to discipline for insubordination, even if nothing "bad" occurs.

But what about that student who missed the last bus and who lives near your neighborhood? **Should you just drive away and leave the student on the school grounds? The answer depends on the circumstances.**

If the student is a 17-year-old, regular education senior, if it is still daylight in a relatively safe neighborhood, and if public telephones are available for the student to call home for a ride, it would normally be appropriate just to go on home. However, if the student is a six-year-old or a mentally challenged high school student, leaving the student alone on campus at the end of the school day would not be prudent. Similarly, if it is midnight, if the area has a reputation for crime and gang activity, and if the student has missed the last bus home, leaving even a regular education senior alone would not be prudent.

In such cases, attempt to notify an administrator and let him or her handle the situation. Once you notify the administrator and turn the child over to his or her physical custody, your obligations are reasonably fulfilled. If you cannot locate an administrator, you could call the parents or guardians of the student and stay with the student until they arrive to take custody. Finally, if necessary, you can call the local law enforcement authorities and turn the child over to them. They can transport the child home or make other arrangements for his or her care.

**What if the student is injured?** Do you load the injured student into your vehicle and transport him or her to the hospital? We recommend that you do not. If the injury is not life-threatening, then it would clearly be better to call 911 and have the local paramedics, fire department, police department, or ambulance service handle the situation.

Similarly, if the situation is life-threatening, the child has a better chance of survival if you call 911 and allow trained professionals to treat the child on the spot. They can begin treatment more quickly, stabilize the child before transport, determine if special arrangements must be made to ensure safety in transport, and arrange for special transport such as a helicopter. Teachers and schools have been held liable for transporting injured students in their vehicles based on the fact that this delayed necessary medical treatment that paramedics could have provided.

**What if you are picking up your child at school and he asks you to transport his friend to your house so they can play video games there?** The other child is a neighbor and his parents know you. In this case, are you acting as a teacher or are you acting as a parent? Check your school policy to see if it makes allowances for this distinction.

The final special situation we will discuss involves the possibility that your administrator directs you to transport a student in your own vehicle. This normally should not occur. If it does, we recommend that you discuss your concerns with the administrator and ask to be relieved of that assignment. If the order still stands, ask that you be given the directive in writing as verification that the action was at school direction. If the administrator will not give you written confirmation of the order, document the oral request as soon as possible by writing a memo to the administrator confirming the oral directive and your compliance with it.

# PART 2

# Effective Discipline

Chapter 2-1 Discipline and Due Process

2-2 Classroom-Level Discipline

2-3 Building-Level Discipline

2-4 District-Level Discipline

2-5 Working with Parents

Case Studies Student Behavior Contracts

Search and Seizure

## Chapter 2-1

# Discipline and Due Process

One possible foundation for a stress-free and legally defensible discipline plan is progressive discipline. This model can be effectively used throughout the school district, the school site, and the classroom. When progressive discipline is used by all the teachers in a school district, it can be a unifying force that brings consistency to the discipline administered throughout a school district. The 10 steps of progressive discipline provide for positive reinforcement and modeling of appropriate behaviors:

1. Silent looking
2. Silent looking with a physical sign
3. Directive statement
4. Physical intervention
5. Classroom isolation
6. Removal from classroom
7. Supervisory intervention
8. Parental intervention
9. Suspension
10. Expulsion

Progressive discipline begins with on-the-spot strategies you can use immediately and progresses to more serious responses that involve an important legal concept: due process.

## Due Process

Just as accused persons are entitled to due process before they can be convicted and sentenced for violating criminal law, accused students are entitled to due process before they can be found guilty and punished for violating school rules. We know that due process is a right, but what does "due process" mean in practice?

Due process is the process that is due the accused person under the circumstances. While at first this may appear to be a circular definition, upon closer examination it explains the difficulty of the concept. The length of procedure required before a penalty is imposed is determined by the severity of the offense and the severity of the possible consequence. A considerably shorter process is required to determine that a student said an obscene word to a teacher and should be suspended from school for one day than is required for the state to determine that a person committed three premeditated murders and is to be sentenced to death.

*The length of procedure required before a penalty is imposed is determined by the severity of the offense and the severity of the possible consequence.*

Likewise, a shorter process is required to keep a third-grader in from recess than is required to permanently expel a student from your school district. This balance was explained by the United States District Court for the North District of Illinois in *Long v. Thornton Township High School District* (1979) as follows:

> *Due process must be determined by what is fair and reasonable in light of the totality of the circumstances. . . . It is a flexible, pragmatic concept and the "goal of the process is to reach a substantively correct result at a minimum of cost."*

You can determine whether adequate due process is part of your student discipline process by answering the following question: Are your actions fair, logical, and consistent? If you can answer all three in the affirmative, your actions are very likely to be legal. If you cannot answer all three questions affirmatively, you will almost certainly face legal problems.

It is important for you to understand the requirements of due process, how the disciplinary procedures interrelate, and your role in providing or facilitating due process and discipline. While there are some differences in the laws of the 50 states, there is a comforting uniformity in the general requirements of due process for student discipline.

*Determine whether adequate due process is part of your student discipline process by asking the following question: Are your actions fair, logical, and consistent?*

## Legal Precedents

Two decisions issued by the United States Supreme Court set the basic standards for due process in student discipline. In *Wood v. Strickland* (1975), the United States Supreme Court reviewed a case where two students were expelled from school for putting a minuscule amount of beer into the punch at a school-sponsored dance. The punishment was reversed, but not because of the great disparity between the offense and the punishment. The school's decision to expel the students was reversed because of its failure to provide the students with appropriate due process before giving them a very serious educational punishment. This decision made it clear that before a school can impose a serious penalty on a student, the school has to give the student a reasonable opportunity to confront the charges and present evidence that he or she is innocent, or that there are extenuating circumstances that could mitigate the penalty.

The second landmark student discipline case was *Goss v. Lopez* (1975), which focused on the due process required for short-term out-of-school suspensions. In this case, the United States Supreme Court held that a school did not have to offer a formal due process hearing before a hearing officer or governing board—with right to counsel, cross-examination, and presentation of witnesses—in order to impose a short out-of-school suspension. The court ruled that for an out-of-school suspension of ten days or less, the required due process was simply notice of what the student was accused of doing, what information caused the administrator to determine that the student did or might have violated the school rule, and an opportunity for the student to tell his or her side of the story. This "mini" due process hearing could occur immediately after the incident upon which it was based.

# Chapter 2-2

# Classroom-Level Discipline

The simplest level of student discipline is the most common—a penalty imposed by the classroom teacher for a violation of his or her classroom rules. The offense could be talking out in class, being out of an assigned seat, not doing an assignment, and so forth. Students are always more inventive than educators, so we will not even try to list all of the forms of classroom misbehavior. The penalties imposed by the classroom teacher are also broad. They start with such simple discipline as silent looking, directive statements, very short time-outs, loss of recess, withdrawal of individual or group privileges, or writing a name on the board.

Most classroom offenses are small, and the penalties are light in terms of their interference with the child's right to an education. Therefore, the due process requirements are low. In most discipline situations, the teacher saw or heard the offense and has direct knowledge of who the offender is. In these instances, the teacher meets the student's right to due process by telling the student why he or she is being disciplined and what the discipline will be.

If the teacher did not directly observe the misconduct, he or she needs to have a rational and legitimate reason to believe that there has been an offense committed by the student to be punished. Due process is achieved by letting the student know how you determined his or her guilt, what the offense was, and what the punishment will be. An

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example would be: "George, five students told me you pushed Jane on the playground, and Jane was crying and had scratched knees. Because you pushed Jane, you will not have recess for the next two days." Due process has been achieved. Remember to record the date, time, and details of the disciplinary action and the reasons for it. If the problem persists, this documentation will be needed to ensure due process for more serious discipline.

*If the teacher did not directly observe the misconduct . . . due process is achieved by letting the student know how his or her guilt was determined, what the offense was, and what the punishment will be.*

Sometimes, a few students will collectively disrupt class, either in concert or through simple misbehavior as individuals, but at the same time. When more than one student is acting out and the class is in disarray, there can be a temptation to punish the entire class. We do not advocate punishing an entire group for the wrongdoing of a small number of students. Keeping the entire class in from recess because four students acted out would arbitrarily punish the innocent. However, if the entire class is out of control, then punishment for all would be more defensible.

Some teachers give group benefits for good behavior (e.g., if the entire class does not have a disciplinary referral for the week, there will be a popcorn party on Friday). This can be a legitimate method of encouraging peer pressure for obedience. Not having the popcorn party would constitute the withdrawal of a contingent benefit rather than the imposition of a negative punishment.

The telephone can be a very effective tool in the classroom teacher's disciplinary "toolbox," especially in elementary school. Teachers might have students call their parents when they act out for the third time in a day or act out in a serious way. Children do not like calling their parents to explain how they misbehaved, and the possibility of having to do so can be a strong incentive for students to not act out.

## Chapter 2-3

# Building-Level Discipline

Regrettably, not all disciplinary problems are minor or infrequent enough to be handled by the teacher at the classroom level. Administrators have the legal and practical authority to impose more severe discipline than classroom teachers. Nevertheless, an administrator cannot normally exercise this authority without the help and support of the classroom teacher. Many, if not most, disciplinary referrals come from the classroom teacher. These referrals must contain enough information to allow the administrator to understand the nature of the offense and the reason for referring this student for potential discipline. Details are important in disciplinary referrals. Teachers should not sugar-coat referrals. If the student used an obscene word toward you, include the word in the disciplinary referral. The more accurate and complete your referrals, the easier it will be for the administration to take appropriate disciplinary action and to defend the decision to discipline against possible protests from parents.

## Short-Term Out-of-School Suspensions

Under the guidelines set up by the United States Supreme Court in *Goss v. Lopez*, a school administrator has the authority to give a student an out-of-school suspension for up to ten school days without holding a hearing before the governing board or a hearing officer. The due process required is simple and rudimentary. Basically, the administrator has to tell the student either orally or in writing what he or she is accused of doing. If the student denies the allegations, then the student must be told why the administrator thinks the student did the alleged action and the student must be given an opportunity to tell his or her side of the story.

## Mini Due Process Hearings

This quick and simple due process hearing is held to provide for fundamental fairness, not elaborate legal defenses. The hearing can occur immediately after the alleged offense and can be entirely oral. For example: "Joe, I am accusing you of hitting Fred. The reason I think you did it is that I saw you. What do you have to say about this situation?"

In these brief due process hearings, a student does not have the right to be represented by counsel or to have his or her parents present. The student does not have the right to cross-examine or confront witnesses. A student is not entitled to a "Miranda warning" before an administrator questions him or her about the alleged misconduct or conducts the hearing. In addition, any statements the student makes can, indeed, be used against him or her in a school disciplinary proceeding—and probably in a subsequent juvenile delinquency hearing if the matter is referred to the police. However, confessions that are coerced in any way are not admissible and may create new and more complex legal problems for the school than the original student misconduct.

After the hearing, the parents should be notified in writing of the student's offense, the hearing procedure, and the penalty. To the maximum extent possible, do not start an out-of-school suspension before the parents are notified. If possible, keep the student for the rest of the school day in detention or in-school suspension. This way, the first day does not count against the ten days, and the parents cannot complain that their child was set free to roam the streets without their knowledge.

The due process requirements for short-term out-of-school suspensions are hardly onerous and actually make a great deal of sense. Our sense of fairness makes us want to avoid punishing students for something they did not do or punishing too harshly when there are legitimate extenuating circumstances. In the hearing, you are required to be fair and use common sense. You are not, however, required to believe any story the student decides to tell. Thus, if a student says that her twin sister hit the other child, and you know the student has no siblings, then you can be fairly confident in not believing the defense.

*In the hearing, you are required to be fair and use common sense. You are not, however, required to believe any story the student decides to tell.*

If the student presents a credible defense that could be verified by outside sources, it is appropriate to do additional checking. Let us assume that a student says he was injured on October 15 when Joe hit him. In the brief due process hearing, Joe explains that he was in juvenile lockup in another town on October 14, 15, and 16. If you confirm Joe's alibi with the juvenile authorities, he has a good defense against the accusation. You will need to look elsewhere for the culprit.

### Consider the Circumstances

Circumstances can cause you to reduce the punishment. One school we know of had a disciplinary policy that required a student to be given a long-term suspension after his or her third on-campus fight. One student had been suspended the previous year for three fights. The next school year, he was in two fights, but then had a change of heart and wanted to stay in school. When another student came up and struck him, he did not retaliate. A teacher observed this and moved toward the students. The student was struck a second and a third time and did not retaliate. Before the teacher could intervene, the student was struck a fourth time and hit back. Under those circumstances, the student was technically guilty of being in a third fight, but the faculty and administration decided that the mitigating circumstances justified not seeking the student's long-term suspension.

May a student be suspended during a time scheduled for examinations? While you cannot go out of your way to achieve this result, if the circumstances arise naturally, this is legal. If the student chooses to act out before examinations, and the logical and consistent timing of the punishment occurs during the examination period, the timing rested with the student. The school is not required to delay the natural timing of its discipline.

Suspensions may only be issued by administrators or other specially designated certified teachers. Neither classroom teachers nor classified employees can issue suspensions. Only superintendents and their assistants, principals and their assistants, deans of students, head teachers, and other teachers with specific authority from the school district governing board may issue suspensions.

You should be aware of any additional requirements your state may have regarding student discipline. Some states limit administrative out-of-school suspensions to five school days, place different or more restrictive limits on hearings, or limit the certified employees who can impose suspensions.

## Other Discipline Options

Building-level discipline is not limited to out-of-school suspensions. There are a number of other alternative consequences that students find to be so unpleasant, they will behave, if necessary, to avoid them. We strongly recommend that the administrator provide the student with the same mini due process hearing that is given for a potential out-of-school suspension before imposing any of these other forms of building-level discipline. The burden is slight, the fairness is laudatory, and the legal protection is comforting.

In-School Suspension

**In-school suspension.** Many schools use in-school suspension or in-school detention. This has the advantage of keeping the students in school and, we hope, learning something. In addition, they can still be counted for attendance figures. Before-school and after-school detention can also take some of the fun out of misbehavior, as can lunch detention. Lunch detention cannot be used to deny students the opportunity to eat, but it can be used to deny them the company of their peers.

Restrict Extracurricular Activities

**Restrict extracurricular activities.** Restricting extracurricular activities can be a strong motivator for better behavior. If students cannot take part in sports, cheerleading, band, clubs, assemblies, and/or field trips, they may determine that the fun of acting out is just not worth the penalty.

## Avoid Corporal Punishment

You will notice that we did not include corporal punishment in the lists of disciplinary actions that could be used at the classroom and building levels. This was not an oversight. We do not recommend that school districts use corporal punishment. Do we as educators need to add more violence to a society in which domestic violence is widespread, television violence is omnipresent, and street and school violence are a daily part of life?

Legitimate questions exist as to the educational soundness of using pain and violence to persuade children not to engage in violence or misbehavior. Using corporal punishment raises the issue of whether "might does make right." Because corporal punishment is more likely to be used on younger children, its use may teach children that it is okay for big people to hit little people.

*Using corporal punishment raises the issue of whether "might does make right."*

While we are totally opposed to corporal punishment from an educational standpoint, we are even stronger in recommending against its use from a legal standpoint. Many states currently ban the use of corporal punishment in schools. Most of the states that allow it place restrictions on how and when it can be used. Educators in these states should determine whether corporal punishment effectively modifies student behavior and, if it does, whether this benefit outweighs the detriment to the student.

### Risks of Corporal Punishment

When corporal punishment is used, there is an ever-present risk that the child will be hurt more seriously than intended. A child may squirm, and the blow intended for his or her bottom may fall on the lower back. What do you do if the child refuses to bend over? Do you hold the child down to hit him or her? What if the child is hit a little too hard, resulting in bruising to the child's buttocks? Whether the student being disciplined is a boy or a girl, are you ready for allegations that striking the student on the bottom was for your sexual pleasure rather than for discipline? Are you ready to accept the risk of criminal assault prosecution if the corporal punishment is not administered in strict accord with state and district guidelines? Do the risks of criminal charges, lawsuits for negligence or civil assault against the district and the individual, and civil rights complaints outweigh the educational benefit of corporal punishment?

## Guidelines for Using Corporal Punishment

If a district allows corporal punishment, it should consistently follow the guidelines below:

- Identify what corporal punishment is. In the jurisdictions that allow corporal punishment, it is a blow or blows to the buttocks of the child.
- Never use a hand. The potential for misuse in a sexual way or the allegation that the punishment was intended in a sexual way is too real to risk.
- Understand that corporal punishment is the application of pain to serve as a punishment for misconduct and as a deterrent to future misconduct. Corporal punishment is not the result of a fit o temper by an educator.
- Understand that pulling hair, pinching ears, throwing students to the ground, or hitting students on the head, back, or arms are not acts of corporal punishment. These acts are generally considered to be felony assault.
- Corporal punishment should never be administered in anger. If the person who will perform the corporal punishment is angry, he or she must calm down before administering punishment.
- When possible, an uninvolved administrator should perform the corporal punishment.
- Never perform an act of corporal punishment without at least two certified employees present, always including an administrator and an employee of the same gender as the student.
- Always give the student a mini due process hearing before imposing corporal punishment.
- Always notify the parents in writing that corporal punishment was imposed.

## Chapter 2-4

# District-Level Discipline

Sometimes students engage in actions that are too serious to be handled with a ten-day out-of-school suspension. Sometimes students demonstrate that lower forms of discipline have not worked, and continue to act out after all building-level discipline options have been tried, often repeatedly. In these instances, long-term out-of-school suspension or expulsion may become necessary.

A long-term suspension is any out-of-school suspension of 11 days or more. It could be 11 days, the rest of the semester, the rest of the school year, or until the end of the next school year. State law may place limitations on the length of an out-of-school suspension.

Expulsion is generally the permanent removal of the privilege of attending school in your school district. A student who has been expelled generally cannot ever return to that district unless he or she is given a specific right to return by the governing board. Be aware that many people, including members of Congress, use the terms "suspension" and "expulsion" as though they referred to the same thing.

It takes more due process to long-term suspend or expel a student than it does to give that student a ten-day out-of-school suspension. The first step in due process for this level of discipline is to notify the student of the behavior that is forbidden and subject to discipline. The decision to impose a long-term suspension will not be made at the

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building level. As a general rule, the hearing to long-term suspend or expel is held before the governing board, before a hearing officer designated by the governing board, or before a hearing officer designated by some other entity such as the state department of education.

*Be aware that many people, including members of Congress, use the terms "suspension" and "expulsion" as though they referred to the same thing.*

## Long-Term Suspension and Expulsion Hearings

For simplicity, we will refer to long-term suspension and expulsion hearings as expulsion hearings for the rest of this chapter. Expulsion hearings are informal administrative hearings. Although they are informal when compared to superior court trials, they may be the most formal legal proceeding a teacher or an administrator will ever participate in.

## Hearing Notification

After the investigation and the decision to recommend expulsion, preparation for the hearing begins with the written notice of the hearing to the parent(s) or guardian(s) and/or to the student if he or she is over 18 or emancipated. The Supreme Court of Kansas explained in *Smith v. Miller* (1973) that "the very rudiments of fair play dictate that a student should have specific and timely notice of the charges against him."

The Charges

**The charges.** The notice should include a statement of what the student is accused of doing and what school rules were violated. The charges have to be specific enough to allow preparation of a defense, but they do not have to be as detailed as a criminal or civil judicial complaint. A brief and clear explanation was provided by the Supreme Court of Montana in *Board of Trustees of Billings School District No. 2 of Yellowstone County v. State of Montana* (1979): "Fair notice is given if a charged party having read the pleadings should be aware of the issues which it had to defend." Pure conclusions are not enough. It would be insufficient to allege that the student was "insubordinate." The statement should give the approximate date, time, and location of the insubordinate words or acts and should also include the name of the person or persons to whom these words or acts were directed.

The charges should be as accurate as possible, but inadvertent minor errors are not fatal to the hearing. The basic rule is that if the error did not prejudice the student (i.e., he knew he had been disciplined on April 8 for insubordination, even though the charge said April 10), then the charge can be amended, even after the hearing has started.

Date, Time, and Location of the Hearing

**Information about the hearing.** The notice must give the date, time, and location of the hearing. There is insufficient due process if people do not know where the hearing will be held. The notice should list the potential witnesses and should inform the student, parent(s), and/or guardian(s) of their right to be present, to be represented by legal counsel, to present witnesses and evidence on the student's behalf, and to cross-examine the district's witnesses. Unless there is a specific requirement in your state, school districts are not required to provide the student with legal counsel at district expense or even notify the student of the availability of legal aid. See *Linwood v. Board of Education City of Peoria* (1972) and *Minor v. San Bernardino City Unified School District* (1983).

Delivery and Form

**Delivery and form of the notice.** The notice should be hand-delivered and/or sent by certified mail, return receipt requested, to provide proof that the parent(s), guardian(s), and/or student actually received the notice. If the parents do not read English or do not use English as their first language, reasonable efforts should be made to include a translated copy of the notice. Consult your state statute or department of education regulations for the length of time that must be provided between receipt of the notice and the actual hearing. If no timeline is specified, we recommend at least five working days. This will give the parents an opportunity to prepare a defense and/or employ an attorney for the hearing.

## The Hearing

Most expulsion hearings proceed according to a general script. If conducted before a hearing officer, these hearings are almost uniformly confidential and closed to the public. Even when held before elected governing boards, these hearings are often exempt from the requirements of the state's open meeting or sunshine laws so as to protect the privacy of the students as minors.

### Opening Statements

**Opening statements.** Prehearing motions are disposed of before testimony is taken. These may be a motion to dismiss or a motion to exclude specific testimony. Because the administration has the burden of proof, its representative starts first with an opening statement. This statement serves as a "road map" that describes what will be presented and gives the hearing officer/board a framework in which to place evidence that may be presented in a disjointed manner. The student or the student's attorney may then make an opening statement at this time, wait until the start of the case, or decide to not make an opening statement.

### Presentation of Evidence

**Presentation of evidence.** Following opening statements, the administration presents its witnesses and documentary evidence. Typically, the administration will ask questions of the witnesses (direct examination) through its attorney. Then the student or student's representative may ask questions (cross-examination). Finally, the administration may ask questions to clarify the testimony (redirect examination).

*The right of a student or the student's representative to cross-examine district witnesses is basic.*

The right of a student or the student's representative to cross-examine district witnesses is basic. Cross-examination is essential to test the credibility of a witness and the importance of his or her testimony. But in administrative hearings, as in court trials, the right of cross-examination is not limitless or timeless. It must be relevant and material. These characteristics are described in detail later in this chapter.

Following the presentation of the district's witnesses and exhibits, the student or the student's representative will be allowed to present his or her witnesses and exhibits with the same procedure of direct, cross, and redirect examination. Following the presentation of the defense's case, the district may introduce rebuttal witnesses.

### Closing Arguments

**Closing arguments.** Closing arguments are a summation of the evidence presented and the parties' contentions as to what the evidence means. Because the administration has the burden of proof, its representative gives the first closing argument. The student or student's representative then gives his or her closing argument, and the administration makes a final closing statement. The hearing officer or board members may ask clarification questions, but must be careful to ensure that their questions are not asked for the purpose of supporting one side or the other. The hearing officer or board is to be impartial throughout the proceeding.

### Recording the Hearing

**Recording the hearing.** We strongly recommend that the district have a court reporter present to take down the testimony or, failing that, a high-quality tape recorder to record all of the proceedings. If you are going to follow the procedure correctly, record it to prove to a reviewing court that you followed the rules.

### Guilt and Penalty Phases

**Guilt and penalty phases.** We recommend dividing the hearing into two phases. The first portion is the guilt phase. In this phase, evidence is presented as to whether the student has or has not done what he or she is accused of doing. If, at the end of this first phase, the hearing officer or board determines the student is innocent of all charges, the hearing is over. If the hearing officer or board decides that the student committed some or all of the alleged offenses, the hearing moves into the penalty phase.

In the penalty phase, the administration and the student or student's representative recommend what, if any, punishment should be imposed. In this second part, the administration may introduce evidence of other school wrongdoing by the student to show that he or she has not learned from lesser punishment. By dividing the hearing into two parts, you safeguard the process against claims that information introduced in the penalty phase biased the hearing officer or board into finding the student guilty of the original charge. If the student is found guilty in phase one, a separate notification letter should be sent to the parent(s), guardian(s), and/or student and should notify the recipients of the information that will be used in the penalty phase of the hearing.

## Legal Objections

Legal objections are almost certain to occur during the hearing. Administrative hearings, such as student disciplinary hearings, are not bound by the strict rules of evidence and procedure that govern civil and criminal trials. Within limits, common sense and fair ruling will likely be defensible. The general standard for administrative hearings is that evidence will be allowed if it is relevant, material, nonprivileged, and nonrepetitive.

### Relevancy

**Relevancy** concerns whether the offered evidence tends to prove anything. For example, a high school senior is accused of attacking another student. In her defense, she tries to introduce evidence that she received an award for honesty in kindergarten. Her actions as a five-year-old in a different setting are meaningless in determining her actions as a high school senior. The offered evidence is not relevant and does not prove anything.

### Materiality

**Materiality** concerns whether the offered evidence has anything to do with the issue. If a high school senior is accused of cheating on an exam and wishes to introduce evidence that he has not been tardy to class all year, such evidence is not material because it has nothing to do with the issue of cheating.

### Privilege

**Privilege** concerns whether a person can be called as a witness and allowed to, or compelled to, testify about something the defendant said. The most common privileges are attorney/client, priest/petitioner, and doctor/patient. You cannot call a student's attorney to the stand and ask him or her, "Did your client admit to you that he hit the teacher?" What was said to the attorney by the client is privileged and cannot be revealed without the client's permission.

With very rare exception, however, there is never a privilege between school staff and students. A conversation between a student and a teacher that begins with the phrase, "you have to promise not to tell anyone what I am about to tell you," does not create a privilege. If divulging the information is needed to protect the welfare of the student, to protect the welfare of someone else, or to assist in the administration of justice or the effective administration of the school, the teacher is free to divulge the information and can be compelled to do so if called to testify under oath.

Unduly Repetitive

**Unduly repetitive** means exactly what it says. If five people have already testified that it was dark and cloudy on the day of an alleged assault, and no one is arguing that it was clear and sunny, then the hearing officer or board can cut off any further testimony on that issue. Conversely, if an issue is sharply disputed and material to the hearing, continued testimony is not unduly repetitive.

## Additional Evidenciary Issues

The hearing officer or board is strictly prohibited from basing a decision on evidence that has not been presented in the hearing. According to *Caterpiller Tractor Co. v. Illinois Pollution Control Board* (1977), "basic notions of fair play require that the parties have an opportunity to cross-examine, explain or refute facts which are the basis of an adjudication."

Circumstantial Evidence

**Circumstantial evidence.** Circumstantial evidence is the proof of facts offered as evidence from which other facts can be inferred. Although circumstantial evidence is given a bad reputation on legal drama television shows, it is perfectly legitimate evidence for murder convictions as well as for student disciplinary proceedings. Indeed, a strong circumstantial case is often more persuasive than eyewitness testimony. Hearsay evidence is admissible in student discipline cases, but it is dangerous and ill-advised to base an entire hearing solely on hearsay evidence.

Right to Cross-Examine

**The right to cross-examine.** As a general rule, a student has a right to confront and/or cross-examine the witnesses either directly or through his or her representative. This right, however, is not absolute. The limitation on the right of confrontation was explained by the United States District Court for Arkansas in *Dillion v. Pulaski County Special School District* (1978):

> *The competing interests between the effective administration of the educational system and the protection of*

> *a student's entitlement to receive an education within this system may mean that even in expulsion proceedings some limits should be imposed on the right to confront the individuals who have made accusations that have led to disciplinary proceedings. . . . [T]he need for anonymity of student accusers, who might otherwise be the victim of reprisals from fellow students, could prevail over the right to confrontation. Such considerations, however, do not apply where the individual bringing the complaint is a teacher or administrator, who would not be subject to the ostracism and psychological trauma that a student accuser might suffer at the hands of his peers.*

Testimony under Oath

**Testimony under oath.** All testimony should be taken under oath, which traditionally is as follows: "Do you swear to tell the truth, the whole truth and nothing but the truth, so help you God?" Because of the prohibitions imposed by some religious faiths against the taking of oaths, individuals can be allowed to "affirm" that they will tell the truth, the whole truth, and nothing but the truth. In this way, they are still subject to prosecution for perjury if they lie, but are not required to violate their religious beliefs. Notice the comprehensive nature of the oath, which recognizes that a partial truth can be as misleading as a complete lie and that truth mixed with lies will be misleading.

Student Attendance

**Student attendance or absence at the hearing.** Expulsions require affirmative acts by governing boards or their appointed hearing officers. A student cannot be expelled by default or because he or she did not come to the hearing. The sad fact is that, in our experience, almost four out of ten expulsion hearings take place without the student or his or her parent(s) bothering to attend. Even if the student does not attend, the administration must still present evidence to convince the board or hearing officer that the student has committed the offenses and deserves to be disciplined. All the student has waived by not attending is the right to present a defense.

*A student cannot be expelled by default or because he or she did not come to the hearing.*

In other situations, a student and his or her parents and representative will appear at the hearing, and the student will admit to having committed the offenses. After determining that the student is aware that he or she is not required to admit to the charges and has a right, without prejudice, to compel the administration to prove the charges, the board or hearing officer may legally accept the admission. This eliminates the need for the introduction of other evidence to prove that the offense occurred and the student committed it.

However, the board or hearing officer is certainly not precluded from taking such testimony. Often attorneys will have their clients admit to the charges in the hope of keeping out the gruesome details. For example, if a student is accused of assaulting another student, the attorney may have his or her client admit to the charge in the hope of keeping the board or hearing officer from learning the full extent of the brutality of the attack and the severity of the damage done to the victim. This information would be important for the board or hearing officer to have in determining the appropriate level of discipline. Thus, the board or hearing officer is not prevented from receiving testimony to provide a full picture of the situation. (See *Abremski v. Southeastern School District*, 1980.)

### Self-Incrimination

**Self-incrimination.** We know that sometimes educators feel that they are police officers, based on the amount of criminal conduct they encounter. Fortunately, from the law's viewpoint, educators are not law enforcement officers and are not held to the same legal standards in investigating and determining wrongdoing. One example is the privilege against self-incrimination. Students can be brought before school disciplinary hearings based on actions that, if true, could also constitute acts of delinquency or criminal law violations. The school district is not required to delay its school disciplinary proceedings until the criminal or juvenile proceedings have been completed or even begun.

In addition, students cannot be compelled to testify in a discipline proceeding, and it would be improper to discipline the student solely on his or her refusal to testify. On the other hand, schools, unlike criminal courts, can draw inferences from a person's refusal to answer questions about whether he did or did not engage in the actions under consideration. This was explained by the United States District Court of the District of Rhode Island in *The Coalition of Black Leadership v. Cianci* (1979):

> *There is no indication that the hearing board will consider the silence of an accused as either pointing to or being conclusive evidence of guilt. Appellee's testimony would be, therefore, entirely voluntary and subsequently admissible at the criminal case. Although the possibility of expulsion may make participation a wise choice, the hearing procedures do not place appellee "between the rock and the whirlpool." He can, if he wishes, stay out of the stream and watch the proceedings from dry land. But, if he does so, he forfeits any opportunity to control the direction of the current. Appellee must decide whether or not to testify at the hearing with the knowledge that, if he does, his statements may be used against him in the criminal case.*

Follow Your Rules

**Follow your own rules.** It is very important to emphasize that a school district is bound to follow its own rules in the administration of student discipline. If your school district's rules require more procedure than state and federal law require, you must follow the stricter rules.

Prepare Written Findings of Fact

**Findings of fact.** Finally, we suggest that written findings of fact be prepared and adopted by the hearing officer or board. While not necessarily required, they strongly assist the district in its defense if a decision to expel a student is appealed in the court system. If you are trying to convince a court that your actions were supported by evidence, it makes good sense to show the court the evidence and reasons for your decision.

While not as complex as a court proceeding, an administrative hearing still requires a great deal of effort and attention to detail. Taking shortcuts in the operation of the hearing is likely to be extremely costly in terms of the probable outcome of the hearing and the time and effort spent to defend the shortcut. Close cooperation between the faculty, the administrator, and the attorneys who represent the district will produce better documentation and stronger cases to present to the hearing officer or board. Careful attention to detail and effective policies will produce clearer and more effective hearings, which will promote the ends of education.

## Chapter 2-5

# Working with Parents

Parents can be a teacher's most effective ally or worst enemy in the struggle to control student conduct. If parents support the school's disciplinary efforts, coordinate their home discipline with the school's, and model the behaviors that the school advocates, the chances of serious student misbehavior are low. However, parents do not always offer this kind of support. We have participated in expulsion hearings in which the student's mother justified her six-foot two-inch son knocking out a five-foot teacher because she "looked at him funny." It may come as no surprise that this student had a long pattern of student disciplinary problems and that his five older siblings had been in prison.

A significant number of parents simply do not participate, for good or ill, in our efforts to help their children learn to operate productively in society. Parents should be the most important adults in the lives of our students. Parents should be positive role models and moral guides for our students. For a variety of reasons, some parents abdicate this role. Others fulfill the role in a way that is harmful to their children.

Lack of parental participation in and support of school programs comes from many, often interrelated, causes. The most common reason for our failure to get parental support is that we do not ask for it. Many parents do not know that we need their help in educating their children. Other parents may know the schools need parental support, but do not know how to provide it.

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Many parents do not trust the schools or the teachers. Some think schools are in league with the police, the courts, or the welfare agencies. Schools represent a different culture, a different society, and an alien racial or ethnic institution.

*We need to recognize that in many households, only one parent—usually the mother—is raising the student.*

Many parents are at their wits' ends in trying to work with their children. They may lack the parenting skills that would help them help us educate their children, or they may be unable to help their children because of their own problems with alcoholism, drug abuse, mental or physical illness, unemployment, or violent personalities.

We need to recognize that in many households, only one parent—usually the mother—is raising the student. The other parent is frequently nominally involved, if at all, in the student's education. Many young men and women have no significant adult male role models in their lives. Some students are not being raised by either custodial parent. Instead, the student's parental figures are often grandparents, older siblings, or uncles and aunts. Still other students come to us from foster homes, group homes, or other institutional residences.

We take students as they are and try our best to give them the educational services they need. We have to take parents as they are as well, and do what is educationally possible to help them help their children learn. There are practical steps teachers can take to increase parental support, and there are practical programs that schools can use to help parents help students learn.

Sometimes a single program can meet many needs. Offering parenting skills courses for parents, for example, can address many problems. If we can help parents become more effective, we can make our jobs easier and more productive.

## What Do Parents Owe Teachers Legally?

Unfortunately, there is not a great deal that teachers and schools can legally require from the parents of their students. Every state has laws that are intended to protect students from neglect and from physical, mental, sexual, or emotional abuse. Every state has elaborate welfare, judicial, and police agencies to ensure that children are not hungry, do not lack needed medical care, and are not subject to beatings or sexual molestation. And every state fails miserably in providing children with the protections of these laws and the services of these agencies. We have a right to demand that parents comply with these basic laws concerning the welfare of their own children.

### Compliance with Child Welfare Laws

Laws protecting teachers from legal liability for reporting suspected child abuse are found in virtually every state, as are laws that require educators and medical personnel to report suspected abuse. If an educator has reasonable cause to believe that a student is being neglected or abused, it is the educator's legal, moral, and educational obligation to report this information to the school and to the appropriate welfare agencies. Although there are no guarantees that the needs of all of these abused and neglected students will be met, we can guarantee that no student's needs will be unmet because educators failed to do their part.

### Compliance with Criminal and Civil Laws

We can also demand that parents comply with criminal and civil laws during any interaction with us as school employees. Many states have special statutes that make verbal abuse of a teacher a criminal act and that have increased penalties for physical abuse of a teacher, much like the enhanced penalties for assault on a police officer. Teachers cannot require parents to like them or to agree with their disciplinary or academic rules. Teachers cannot even require parents to be polite and cooperative. But teachers should insist that parents not engage in behavior that is assaultive, threatening or intimidating, or physically or verbally abusive. Incidents of parental abuse of school personnel need to be reported to the school and police authorities. As educators we must be willing to report and to testify about criminal behavior aimed at school personnel as a means of protecting ourselves.

### Compliance with School Rules

Educators can also demand that parents comply with school rules governing the campus and school activities. Rules concerning visitors on campus are made for all nonschool personnel, including parents. Like any other visitor, parents are required to comply with check-in provisions.

Parents do not have special rights to engage in behavior that disrupts our classrooms or school activities. Reports should be made to school authorities if parents do not comply with the school's rules for visitor conduct. If needed, restrictions should be imposed on a parent's ability to come onto the school campus if the parent will not comply with these rules of conduct.

## What Do Teachers Owe Parents Legally?

### Complete and Accurate Information

The legal requirements concerning parents are the least significant of an educator's obligations to his or her students. As educators, we are legally obligated to provide parents with accurate and complete information about their children's education. Before the enactment of the Family Educational Rights and Privacy Act, there were numerous incidents of false and harmful information being placed in student records. This information was then given to prospective employers or the military, but parents were denied not only the right to correct the information, but even the right to know that the false information was in their child's records.

### Representation and Input

If the student is a special needs student with disabilities covered by the Individuals with Disabilities Education Act (IDEA) or the Americans with Disabilities Act (ADA), we owe the parents increased rights of representation and input into their children's educational programs. Increased representation and input, however, do not equal acquiescence to parental desires if these are counter to the legitimate educational needs of the student. For more information on disciplining children with special needs, see Part 4, Special Education.

Most of an educator's legal obligations are to the student rather than to the parents. The parents are the legal guardians who act to enforce the rights of their children. Thus, most legal proceedings to correct wrongs done to a student, such as a physical or sexual assault by a school employee or a bus accident caused by a school bus driver's negligence, are initiated by the parents in the name of the injured child or by the child when he or she becomes an adult.

## What Do Teachers Owe Parents Educationally?

Information and Input

First, educators owe parents the right to provide them with information and to be consulted on their children's education. Normally, no one will know a student's abilities, characteristics, and motivation better than his or her parents. The parents have the right to provide this input, but the decision on how to use it rests with the trained educational professional.

Second, educators owe parents the right to information and recommendations on how to help their child educationally. We have included below a number of specific recommendations on how teachers can help parents help students, as well as a number of programs that teachers can recommend to their schools for parental assistance.

Use the PNP System

**Use the PNP system.** The PNP system for discipline involves starting and ending any corrective or evaluative action with a positive statement about the individual. For example: "Janice, I recognize your leadership skills and how the other students look to you for guidance on how to behave." This is then followed by the needed correction. "When you make sarcastic and negative comments in class, it disrupts the class and causes some of the students to not take the lesson seriously." This corrective suggestion is then followed by another positive statement about the student. "I know that sometimes the lesson seems a little simple for you, but I know that you can help me reach the other students by taking the class seriously and showing the other students how to listen and interact cooperatively."

This system works remarkably well with parents. If a teacher starts a parent conference with a recital of how difficult and uncooperative the student is, the likelihood of parental cooperation approaches zero. However, if the teacher starts by discussing some of the student's good points, skills, or abilities and then moves into discussing the particular problem, the parents' receptiveness is increased. This lays a foundation for a mutual discussion of what both sides can do to help the student. The meeting should end with more positive statements about the student and the participants' mutual expectation for resolving the problem.

*If a teacher starts a parent conference with a recital of how difficult and uncooperative the student is, the likelihood of parental cooperation approaches zero.*

Ask the parents what motivates the student at home and whether they have any special discipline to which the student responds particularly well.

Respect and courtesy are critical to any interaction with parents. Parents may not have the same level of formal education, may not have the same earning capacity, and may not even share some of our basic ideas about work and education, but they are the parents of our students and most often the people who can best help us maximize the success of our students.

### Provide Parenting Classes

**Provide parenting classes.** A common reason for student failure, academically and behaviorally, is that their parents do not know how to parent. They do not know how to constructively discipline their children, how to reward and motivate their children, or how to set and enforce boundaries, which is the first essential element in a child's development of self-discipline.

We need to educate the parents as a part of educating their children. Parenting skills classes offer an opportunity to touch multiple generations at one time. The parent becomes more effective, more empowered, and more positive, influencing his or her children, who will someday be parents using these skills on the next generation of students.

Parenting skills classes are an ongoing process because the parenting skills appropriate for a seven-year-old are drastically different than the skills appropriate for a 17-year-old. Effective programs available for parent training emphasize teaching parents how to show love through strength, boundaries, encouragement, and respect.

Parenting skills classes can include conflict resolution, aggression and anger management, and mediation skills—the same skills covered in student and teacher programs. If we can help parents learn options for handling conflicts with their children, the parents' modeling of these skills may help the students use the same options in their own conflicts. In addition to these topics, schools should ask the parents to identify the skills and knowledge they feel they

*If we can help parents learn options for handling conflicts with their children, the parents' modeling of these skills may help the students use the same options in their own conflicts.*

need to help their children. Schools should then build programs to meet these needs.

Seek Input

**Seek input.** Requesting parental assistance is a valuable strategy for increasing parental support of school goals and for demonstrating to the students that they will not be able to "divide and conquer" the adults. With proper training and monitoring, parents volunteering in the classrooms, in hall monitoring, and in activity supervision create a united front in the struggle to modify student behavior. If communications are open and honest between educators and parents, rumors and other disruptive attempts will have no fertile soil in which to grow.

Asking parents for input on classroom rules, school disciplinary policies, school dress codes, and school drug and alcohol programs provides additional opportunities for home and school collaboration. Many of the elements that we need in these plans are common sense and will readily be suggested by responsible parents. Let as many of the ideas as possible come from the parents, with educators fine-tuning the suggestions and filling in any gaps. As long as the plans have the elements we need to function effectively, let the parents take credit for the provisions of the plan. Educators need cooperation, not credit.

Be Persistent and Flexible

**Be persistant and flexible.** Teachers need to be persistent in their efforts to contact and connect with parents. Often the families of the aggressive students will be the hardest to connect with. Early efforts are critical. If we ignore the mildly violent or disruptive behavior of a third-grader, it will become harder to correct the student or gain the cooperation of the parents when that child is now a high school junior who has assaulted a staff member.

If we want parental input and cooperation, we need to make it simpler for them to help us. Most parents now work outside of the home, and work schedules can be a powerful deterrent to school-home communication and collaboration. Hold functions at multiple times to make it possible for workers on all shifts to attend. In addition, many parents cannot attend school functions because they have no one to watch their student or their other children. Make child care available for parent-teacher conferences or even school concerts or fairs to encourage parents to attend. Extend personal invitations. It is harder to say no to a telephoned invitation than to a photocopied schedule of events. A personalized note saying that you look forward to seeing them at the school play could also motivate parents to attend. Hold community meetings in a church or other public building in the neighborhood for the parents of students in your class or your school. Send home regular reports on what is happening in the classroom, and encourage parents, in accord with the school's visitor program, to visit their child in class.

*Extend personal invitations. It is harder to say no to a telephoned invitation than to a photocopied schedule of events.*

## The Parent-Teacher Improvement Conference

Some matters of student discipline are best resolved with the help and cooperation of the parents. Holding an improvement conference can be an effective way of enlisting parental help and support. The following suggestions will help you plan and conduct an improvement conference.

1. Go to the student files and read about the student. This can be most enlightening. Consider past behaviors, former placements, testing data, parenting patterns in the home, and movement from school to school.

2. Check with the counselor, the nurse, and the principal or vice principal. These people are excellent sources of information and can keep you from walking into a difficult situation unprepared.

3. Map out a strategy and a desired outcome. You should know in advance what you want to accomplish so you can focus your efforts on enlisting the parents' support in achieving the goal.

4. Stick to your plan. If you have called a parent in to discuss a particular behavioral situation or a particular academic situation, stick to that. Don't allow yourself to be drawn into discussing other issues surrounding the school, the community, the

neighborhood, other teachers, your personality, the administration, and so forth.

5. Make the conference as formal as possible, even if you are on friendly terms with the parent. This keeps the conference focused on business and cuts conference time to a minimum. To accomplish your goal and preserve your friendship, be formal.

6. Take notes during the conference. This will let the parents know that you are listening to them and that you are going to refer to the notes as part of a solution that will develop over time. You may also need to refer to these notes in cases that escalate rather than subside. This will help you get administrative relief because the notes will help the administrator understand the nature of the offenses, the chronology of the offenses, and your efforts to find a corrective solution.

7. Write down the plan of action agreed upon. If possible, give a copy to the student and the parents. This will allow all concerned parties to keep track of the student's progress in reaching the behavioral or academic goal.

8. After the conference, write down the main points that were discussed. Do not wait until later because you may forget salient points. Get it down in writing when it is still fresh in your mind.

9. In most instances, you will want to arrange for a follow-up meeting. This is true even if that follow-up meeting is to advise the parents that the student is now doing very well. The follow-up meeting facilitates better understanding and rapport between parent and teacher. To this end, you might create a discipline follow-up calendar on your computer or keep a day calendar especially for that purpose.

## Our Strongest Allies

Essential to any successful home-school collaboration is clarity of understanding. Make sure that you and the parents are hearing and saying the same thing. Misunderstandings become the basis for feelings of betrayal. Parents can be our strongest allies in helping their children become successful and well-balanced students. Just as we use our skills and training to motivate and teach the students, we can use these same skills and training to motivate and teach parents to help their own children.

# Case Studies

## Student Behavior Contracts

**One of my students has been a serious discipline problem. Would a behavioral contract help both of us, and if so, how should I implement it?**

A behavioral contract would be helpful and can be implemented fairly easily.

A contract is a document that records an understanding between two or more people. There is a saying that an oral contract is not worth the paper that it is written on. This applies here. If you are going to have a behavioral contract with one of your students, put it in writing. That way, no one's memory becomes fuzzy as to who will do what. The terms of the contract should be simple, clear, and definitive. Expectations and the rewards for meeting those expectations should be described clearly. A behavioral contract that states that a student "will behave" is worse than useless. **A behavioral contract needs to be relatively narrow, at least in its initial version, and highly achievable.** If the student cannot realistically meet the terms of the contract, it offers no advantage to the teacher or the student.

We recommend that you initially use a short-term contract to focus on one to three behaviors that are particularly bothersome. For example, if Larry is aggressive with other students, his behavioral contract can include an agreement not to physically hurt other students while at school. He agrees that he will not hit, kick, bite, push, or otherwise deliberately touch other students. Under the terms of his contract, if he does hurt another student, he will be given the standard school punishment, which may be two days of noon and recess detention. For each day that he does not strike another student, Larry will be given 15 minutes of free time on the class computer on the day following the no-hit day. If Larry finishes the entire week without striking another student, he will be given an additional half-hour on the computer on the following Monday.

The initial contract is for a one- or two-week period. As Larry begins to comply, you can lengthen the periods of required compliance and add more requirements. For the next two-week period, for example, you could retain the provision about not striking other students and add a provision that Larry will not use obscene words or verbal threats toward other students. In the final version of the contract, Larry agrees not to strike anyone, use verbal threats, or talk in class without permission. For each week of compliance, he is given an hour of free computer time on Friday afternoon. In addition, if he finishes the nine weeks of the contract without an incident, the entire class can have a popcorn party for an hour.

The initial contract should include short, highly achievable requirements. If the student is not given feedback quickly, he or she is less likely to respond. Under all circumstances, you must honor your part of the contract.

**Contracts should also offer positive rewards.** A contract that states that if the student does not hit anyone, he or she will not be put in time-out offers nothing to the student. He or she already expects to go to time-out for hitting. Give the student something to work for, not something to work to avoid. To ensure that failure on a given day does not mean failure of the contract, make sure the contract has both short- and long-term rewards. Then, if the student misbehaves once and loses the big reward, he or she can still try to comply and earn the smaller, interim rewards.

# Search and Seizure

**A student tells me that she thinks another student took her five-dollar bill. Can I search the room, the desks, the lockers, and the students to find the missing money and the thief?**

Generally, no.

As a public school teacher, you are a governmental employee and an agent of the government. That government is admittedly very local and very limited in its jurisdiction and mission, but it is still "government" for the purposes of search and seizure of students and their belongings. Educators should be careful when handling a potential search-and-seizure situation for two reasons. First, if the search is done improperly, the "evidence" seized may not be admissible in a juvenile delinquency hearing or a school student discipline hearing. Second, handling a search-and-seizure situation improperly may create civil liability for the teacher as well as the school.

The United States Constitution protects citizens from unreasonable searches and seizures. This area of law becomes amazingly complex and detailed when addressing criminal and juvenile prosecutions. One aspect of this legal doctrine is **the exclusionary rule.** Basically, this rule **"punishes" the government if it conducts an illegal or improper search and seizure by preventing the use of the seized evidence in a governmental hearing such as a criminal trial or a student expulsion hearing.** Law enforcement agencies have complex rules for search warrants and warrantless searches. These are all centered around the concept of "probable cause." For example, for a police agency to conduct a search, it must be probable that a crime has been committed and probable that the search will produce evidence of the crime.

The United States Supreme Court has held that public schools are governmental entities included in the constitutional prohibition against unreasonable searches. However, the standard of what is reasonable is different for a school. The courts recognize that schools, administrators, and teachers are neither police officers nor lawyers or judges. The rules are much simpler for a school search, but they still must be followed.

Basically, **a school search will be upheld if the person making the search had "reasonable" cause to believe that a school rule had been violated and that the search would produce evidence of the offense.**

Reasonable cause is a much lower standard than probable cause. Reasonableness is generally based on the type of rational decision that a trained and experienced administrator would make in maintaining order in the school. The search also has to be conducted in a reasonable manner. Thus, if the school suspected that a student had a rifle on campus, it would not be reasonable to search the student's pants' pocket. If such a search found a baggie of marijuana, it would likely be excluded as evidence because the educator had no chance of finding the contraband that was the actual basis of the search. But if the school had reasonable cause to believe that a student had a pistol in a locker, and the search of the locker found the same baggie of marijuana, it would likely be admissible evidence in both a student expulsion hearing and a juvenile delinquency hearing.

Classroom teachers need to understand these legal principles. They also need to realize that they will seldom, if ever, put these principles to work personally. **We strongly advise that, barring highly unusual circumstances, the administration conduct any searches of students or their possessions.** It is better to turn the matter over to administrators for two reasons. First, they have more specialized training. Second, they are responsible for conducting the search properly and for handling the consequences if the search is done improperly.

Improper searches based on scenarios like the one given in the question above have served as the basis for firing several teachers. In one instance, an elementary school student reported that money had been stolen. After deciding that a classmate must have taken the money, the teacher separated the boys from the girls and had the students disrobe. The teacher then searched the students' clothing, but did not find any stolen money. The student had left the five-dollar bill in a different set of clothes than the one she had worn that day.

This type of search created tremendous problems for the educator. The first problem was that searching everyone on the chance that someone may have taken the money was not reasonable. **Mass searches are seldom reasonable.** There may or may not have been a reasonable basis to determine that a theft took place. There was, however, no reasonable basis to determine that every student had taken the money or that any individual student had taken the money. The second problem was that the search violated the students' reasonable expectation of privacy. Students and their parents can reasonably expect that when the children go to school, their persons will not be searched, and they have an absolute right to expect that the students will not be forced to undress as a part of a search. **No educator should ever, under any circumstances, participate in a strip search of students.** This sort of action outrages parents, the community, and the governing board. An educator engaged in this type of conduct may be fired, sued, prosecuted, and may even lose his or her teaching certificate.

So what should the classroom teacher do about search-and-seizure issues? One of the common themes in this book is our recommendation that complex or sensitive issues should be referred to the administration. Rather than conducting searches on your own, as a classroom teacher, it is generally better that you notify the administrator of the situation and allow him or her to decide whether to search and, if so, how.

Therefore, if a student reports that money is missing, you should contain the class, notify an administrator of the situation, and then step back and let him or her make the decisions. If you suspect that a student is carrying marijuana, direct him or her to come with you to the principal's office and explain the situation to the administrator. If the student refuses to come with you, do not attempt to tackle the student or drag him or her to the office. Simply tell an administrator as quickly as possible and let him or her handle the situation. If you suspect that the student is carrying a weapon or if you believe that the student will run and discard the contraband if you confront him or her, then go and ask an administrator to handle the situation. If you suspect that a student has marijuana or a gun in his or her locker, do nothing to alert the student of your suspicions. Simply notify and allow an administrator to handle the situation.

We discussed the concept of reasonable expectation of privacy. **Students have a reasonable expectation that their bodily privacy and personal property will be respected.** Therefore, a search of a student's clothing or purse or backpack carries a greater requirement of reason to believe that the search will produce contraband. The students have a lower expectation of privacy with regard to their school lockers and an even lower expectation of privacy with regard to their school desks.

As a classroom teacher, if you see one student take another student's property and put it in a pocket, it would be reasonable to take the student aside and ask the student to empty his or her pockets. If the student does so and produces the stolen item, report it to the administrator or provide classroom discipline, depending on the circumstances. A kindergartener who takes a fellow student's pencil should probably be handled in class. A senior taking another student's watch should probably be reported to the principal. If the student refuses to empty his or her pockets, do not reach into the pockets or otherwise force the issue. Simply isolate the student and call the administration.

As a classroom teacher, if you see a student place something suspicious in her fold-top desk, it would be reasonable to ask the student to lift the desk lid so you can inspect the contents. There is no real reasonable expectation of privacy in a school desk. If your search produces a missing item or a copied paper, provide appropriate discipline. If, however, you suspect the presence of serious contraband, such as drugs, alcohol, or weapons, direct the students to some other activity at a different location and call the administration.

**The general rule in search-and-seizure situations is to stabilize the situation and then let the administration take over.** For more information on handling contraband, see the case study, "Handling Contraband," at the end of Part 7, Gang Activity.

# PART 3

# Documentation

Chapter 3-1 Why Document?

3-2 Effective Documentation Techniques

3-3 Using Documentation

Case Studies Parental Access to Student Information

Staff Access to Student Information

## Chapter 3-1

# Why Document?

Although it may seem like a time-consuming exercise that only creates more paperwork for administrators and teachers, detailed documentation of misbehavior and disciplinary consequences is the legal sword and shield of student discipline because it can:

- serve as a memory aid,
- establish baseline rates of behavior,
- establish student notification,
- persuade the disciplining authority,
- provide a successful defense on appeal,
- provide a defense against Civil Rights or Department of Education complaints, and
- protect against claims of civil or criminal wrongdoing by the teacher.

Without the sword of documentation, many wrongdoers are never brought to justice. Without the shield of documentation, the classroom teacher could face false allegations of misconduct or negligence. Documentation is imperative!

## Serves as a Memory Aid

The most important reason to document is that detailed records can serve as a memory aid for the individual

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*Details of even the most serious situations, such as a student assault, will fade with time.*

teacher or administrator. Details of even the most serious situations, such as a student assault, will fade with time. If they are written down as soon as possible after the event, the incident can be documented while it is fresh in your memory. A later review of such detailed reports will usually refresh your memory and allow you to testify from your memory of the event. Even if you do not gain a renewed, independent recollection of the details of the event, you will remember that you wrote the document soon after the event, and that the memories were fresh and accurate at the time.

If less serious situations are not documented as they occur, even as few as six weeks later you are likely to have no memory of the situation at all. Thus, if Jenny disrupts class on October 1 by throwing paper clips, and you orally admonish her, write it down. If she disrupts class again on October 7 by throwing paper airplanes, and you orally admonish her, write it down. Then, when you send her to the principal's office on October 9 after she disrupts class a third time by throwing a book at another student, you can detail in your written notice to the principal exactly how she has disrupted class three times in the last two weeks. This kind of documentation will be far more persuasive than writing that the student is "always" disrupting class or "constantly" disrupting class.

## Establishes Baseline Rates of Behavior

Documentation helps you determine if corrective action is working by clearly showing whether the level of misconduct is increasing, remaining the same, or decreasing. You should first identify the behaviors that are undesirable. If a behavior becomes a persistent problem, you should then determine the rate or frequency of the misbehavior. This becomes the baseline rate for that behavior. As you experiment with strategies to help the student change his or her behavior, you continue to observe and record misbehavior. Based on this systematic documentation, you can decide whether to continue or change strategies.

The recording devices can be sheets of paper, charts, computer clicks, wrist counters, or even Post-it™ notes stuck to your clothing. You can be the statistics keeper, but it is easier and may be more accurate if an aide, a volunteer, or another teacher records the data.

## Establishes Student Notification

Students who are sent to the office for breaking a rule will often deny that they were told to do something or will claim that this is the first time they did anything wrong. Protests that the offender is innocent and is the real victim can be belied when you provide a detailed account of the events that prompted you to send the student to the principal. When the student claims she was never told that she could not throw a book to get a friend's attention, you can produce your documentation that class rules were discussed on September 6 and that the records show Jenny was present on that day.

Your documentation would also show that Jenny was disciplined on two earlier occasions, and that on each occasion she was told not to throw items. With your simple notes, the student's defense crumbles and she may face more severe discipline for having lied to the administrator. In addition, word may get out to the students that they cannot talk their way out of detention if you are the one doing the write-up. When Jenny returns to class, she may decide it is not in her best interest to act out or, if she does act out, she may choose to do it on someone else's shift. Either way, your professional life has become simpler.

## Persuades the Disciplining Authority

Documentation is also a tool for persuading the higher disciplining authority, such as the dean of students, vice principal, or principal, to impose disciplinary sanctions. As lawyers, it is our job to make it easy for a judge or jury to rule for our client. As a teacher, your task should be to make it easy for an administrator or governing board to determine that particular events took place and that these events were prohibited and/or harmful. The better your documentation, the more understandable the event becomes, and the easier it is for the disciplining authority to determine that discipline is appropriate.

## Provides a Successful Defense on Appeal

In a society that appears at times to value litigation over qualities such as remorse, personal responsibility, or accountability, it should come as no surprise that students and their parents regularly challenge school-imposed discipline in the courts. The documentation produced by the teacher on the scene of the assault or written by the teacher whose class endured 37 incidents of disruption before the offender was suspended is often the basis for a judicial decision to uphold the school's disciplinary action.

## Provides a Defense against Civil Rights or Department of Education Complaints

Similarly, students and their parents may file complaints with state and federal agencies, such as the Office of Civil Rights (OCR) or the United States Department of Education, alleging that the student was disciplined because, for example, she wrote a student editorial saying that you were a prejudiced, unfair teacher. Your documentation will help establish that the student was actually disciplined because she hit another student, in the presence of three witnesses, two days before her editorial appeared in print. Your documentation can help establish that students who write favorable editorials are also disciplined when they commit the same offenses as the person complaining to the OCR. Thus, your documentation becomes the proof with which you and your school establish that discipline is consistent and based on student conduct, rather than on arbitrary or discriminatory factors.

*Your documentation becomes the proof with which you and your school establish that discipline is consistent and based on student conduct, rather than on arbitrary or discriminatory factors.*

## Protects against Claims of Civil or Criminal Wrongdoing by the Teacher

Finally, documentation becomes the shield that can help protect both you and your school district against wrongful claims of unprofessional conduct, criminal conduct, or negligent conduct. Consider how this works in the following scenario. A teacher comes onto a fight in progress. When the teacher sees a student pull a knife and attempt to stab another student, he dives to tackle the armed assailant. The knife-wielding student falls and breaks his knee, and the knife is removed from his possession. The teacher writes a detailed report of the incident, as does the intended victim of the knifing, a custodian who witnessed the teacher tackle the student, and a student onlooker.

Six months later, the parents of the knife-holding attacker sue the school and the teacher for negligence and intentional tort because of the teacher's wrongful and malicious assault on their innocent child. (While we know you would like to believe this is an exaggeration, it is not. Shifting fault from the criminal youth to you, the teacher, is a prime tactic of criminal defense attorneys.) The detailed documentation that was compiled by witnesses and the involved parties immediately after the incident, while all the details were fresh, will be very welcome to the school's attorney as he or she defends the teacher and the school, armed well with the sword and shield of documented truth.

# Chapter 3-2

# Effective Documentation Techniques

Although the forms of documentation can vary greatly—from a word-processed report on one incident to a daily handwritten teaching journal—there are two basic kinds of documentation. Formal documentation includes material that is kept in a student's file. Informal documentation includes material written by the teacher as a personal memory aid. Informal documentation can be an excellent foundation for effective formal documentation.

Formal documentation includes records in a student's disciplinary file, student file, or other permanent form of recordkeeping. These records can include suspension notices, records of conferences, disciplinary contracts, and incident reports, etc. Formal documentation should be discussed with the student and, as appropriate, the parents. You may consider having the student sign any such record as an acknowledgment that he or she saw the document. Formal documentation is normally kept in the administrative offices.

Informal documentation is written material kept by the teacher as a memory aid and can include a daily journal, a note pad, a desk blotter, a computer file, or any other form by which data can be recorded and stored. Informal documentation should have enough detail to remind the writer of the event that prompted the notation, the action taken, and the purpose and basis for the action taken. It should also be written clearly enough to allow a third party to understand the situation.

## Play the Odds for a Big Payoff

*Protect yourself.*
*Protect your students.*
*Protect your school.*
*Document.*

Keeping these types of written records requires mental discipline on the part of the classroom teacher. Nine times out of ten, or even 99 times out of 100, the documentation will not be necessary. However, when it is necessary, documentation can mean the difference between a student offender "walking free" or receiving deserved punishment. Documentation can mean the difference between a teacher being vindicated and a teacher who is vilified and held liable. Protect yourself. Protect your students. Protect your school. Document. This chapter focuses on using documentation to write a report on student misconduct.

## Just the Facts, Ma'am

Sergeant Friday's quip from *Dragnet* is worth remembering when you use your documentation to write a report on student misconduct. Detail and accuracy are the cornerstones of an effective report. Do not try to "sugar coat" the situation by downplaying the seriousness of the incident or using euphemisms that would hinder a clear understanding of what happened. If a student swears at you, it is not enough to write that "Nathan used naughty language toward me." If the student used profane, vulgar, threatening, intimidating, or offensive language, include the actual words in the report. Be as accurate and detailed as possible. If the language was serious enough to offend you, it is serious enough to be quoted accurately so that the disciplining authority can understand why it would give offense.

As you strive for accuracy, however, do not exaggerate the conduct to make the situation seem more dramatic or to ensure a certain level of discipline. One teacher exaggerating a situation can undercut an entire school's credibility and cast doubt on whether the student did anything wrong.

## How to Write a Report

Whether you are writing a report as a witness to or the investigator of a school crime or disruption, remember to answer the journalist's five Ws: what, who, where, when, and why.

What?

**What?** Your report should contain a detailed account of how you became aware of the situation. Did you happen upon the fight in progress? Did a student or other staff member's report of the fight prompt you to go to the scene? Did you hear the sounds of conflict echoing through the school building? Describe in detail what you observed, using appropriate sensory details: you heard a shot, you saw a student fall, you smelled cordite, you touched the wounded student to see if she was breathing.

Then include what you and others did in response to the situation. Did you tell a student to notify the principal? Put it in your report. Did you call 911 for a paramedic? Put it in your report. Did you direct the assembled students to go back to their classrooms? Put it in your report. Did you pick up the knife (with a handkerchief, of course)? Put it in your report, and keep the knife until you can give it to the police or a member of the administration.

Your report should contain descriptions of fact, not statements of judgment. It should detail the behaviors and acts observed or reported in objective terms that neither downplay nor exaggerate the facts. What did you see? What did you hear? What did he do? What did she say?

As time allows, have the victims, witnesses, and suspects tell you (or your colleagues) their detailed accounts of what happened. As soon as possible, have each of the victims, witnesses, and suspects write down what happened in narrative form and in detail. If the accounts are truthful, they will be valuable. If they are false, they may be even more valuable because they lock the suspects into stories that can be investigated and impeached.

Who, When, and Where?

**Who, when, and where?** The *who* in your report is everyone who has or might have information pertinent to the incident. Who notified you of the situation? Who was at the scene? Who was involved? Who arrived after the incident? Who heard about the circumstances before the event or heard statements after the event?

The *when* part of your report places the incident in a specific time frame on a specific day or range of days. On what day did the event occur? At what time did the event occur? When did you first become aware of the event? What is the date and time of your written report?

The *where* part of your report places the incident and matters relating to it in a specific location(s). Where did the event occur? Where were you when you were notified of the incident or when you became aware of the incident?

Why?

**Why?** This part of your report should not include speculations stated as though they were facts. If there are suspicions that cannot be confirmed, state that they may be possible causes, but clearly identify them as speculation. If a student witness gives a statement that may help you understand why the event took place, put it in your report. For example, immediately before Joe hit Jimmy, Jimmy said that Joe looked like E.T. If the mutual combatants, assailants, or victims give explanations, put them in the report. The statements of the accused may be self-serving, incomplete, misleading, or totally false, but they are the statements the accused has made and they need to be recorded. The truth of statements from any person involved can be examined later—the important thing is to get them down in writing as they occur.

## How to Describe Misbehavior

When noting student behavior, it is important to use statements of fact as opposed to statements of judgment. In looking at modifying student behavior, it is essential to pick behaviors that can be quantified (the number of incidents can be counted) and controlled. Noting that a student hits other students is an accurate statement of a behavior that can be counted and controlled. Stating that a student is hostile is a statement of an attitude that is difficult to quantify and more difficult to control. Stating that a student does not comply with directives is more descriptive and useful than stating that the student is lazy or unmotivated. Describing a student as one who argues or talks out is more useful than describing that student as belligerent and angry.

## Working with Evidence

- *Avoid touching anything the assailants have touched.*
- *Do not allow anyone else to touch the evidence.*
- *Secure the area for the police.*

## How to Describe a Suspect

As a teacher, you may be the victim of an assault. You may witness a student being assaulted and see the assailant run away. If the suspect is not apprehended and restrained on the scene, you will need to be able to provide a detailed and accurate description of the assailant. The general descriptions contained in mystery novels and police movies are next to worthless. A description of a white male, between age 16 and 18, five-foot seven-inches to five-foot nine-inches tall in a white T-shirt and jeans will probably narrow the suspects down to a few hundred.

Whether you are the victim of or a witness to a crime, you are going to be excited and may either notice fewer details or an overwhelming number of details. The following strategies will help you focus on specific details that may help authorities identify the assailant.

- If there are multiple assailants, focus first on describing the most distinctive one. If the police can catch that one, the others are more likely to be apprehended. A detailed description of one out of five suspects is far better than a vague description of all five.
- Focus on one distinctive or prominent feature. Does the person have scars, tattoos, or physical deformities or abnormalities?
- Focus on physical size, height, and weight.
- Focus on speech and body language. Did the person have any distinctive speech patterns or mannerisms, or use any unusual gestures?
- Focus on eye and hair color; eye, nose, mouth, and ear structure; hairstyle; the presence or absence of facial hair; complexion; possible ethnic background.

*A detailed description of one out of five suspects is far better than a vague description of all five.*

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- If the person used a weapon or other item, was he or she right- or left-handed?
- Focus on clothing, but remember a shirt can be changed much more easily than a tattoo of a blue dragon on the forehead.
- When you give police the description or reconstruct the incident for your report, start at the top of the suspect's head and move down, noting each detail that you remember.

## Chapter 3-3

# Using Documentation

One example of how documentation can support and defend educational decisions arises out of an actual case in which we were involved. An autistic, trainable, mentally disabled child engaged in persistent spitting behavior. She would spit at fellow students, teachers, aides, and visitors. As might be expected, this behavior interfered with her educational progress and was extremely unpleasant and unhygienic as well.

A statement that the student was "constantly spitting" would have been of little use in the special education due process hearing in which the parents protested the behavior modification techniques used by the school. Instead, the school personnel charted the student's spitting behavior over a period of a week, noting a daily average of over 300 spitting episodes.

After a documented opinion from the school's dental consultant that it would not be harmful to the child, the school began to brush the child's teeth lightly with a toothbrush dipped in mouthwash. The student found this unpleasant and, within a period of days, the spitting behavior dropped to an average of two to three times a day, as opposed to 300 times a day. The detailed documentation that recorded the initial rate of occurrence, the consultation with a dentist before beginning the modification techniques, and the modified rate of occurrence persuaded the due process hearing officer to rule on behalf of the school.

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# Case Studies

## Parental Access to Student Information

**The parents of one of my students are very interested in information about another student in my class. May I give them information about the other student?**

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No. The 1974 Family Educational Rights and Privacy Act (also referred to as the Buckley Amendment) was enacted to give public school students and their parents the right to access their own school records and to prohibit an outsider's unauthorized access of student records. Before the federal legislation was enacted, many school districts did not give students or their parents access to most or all of the records the school maintained on the students. As a result, errors entered into student records would be carried forward from year to year, without the students or parents having a right to review their files or request corrections. At the same time, student records were commonly released without the knowledge or consent of parents or students to the military, prospective employers, colleges and universities, and other parties who expressed an interest in the records.

These abuses are now prohibited by the Family Educational Rights and Privacy Act, which lists the entities that are allowed access to student records. Access to student records is provided to some, but not all, school personnel. (See the following case study for more information.) Information may be transferred to a student's new school when the student transfers. Student records are available by court subpoena for various civil, criminal, and juvenile court matters and for law enforcement investigations. Outside of the limited exceptions contained in the act, student records may not be distributed without parental consent or the consent of the student if he or she is an adult or emancipated minor.

In addition to prohibiting the distribution of written records about a student, the law also prohibits distribution of specifically identifiable information about a student. This includes oral transmission of the information in the student files. If statistical data are so specific as to make identification of a specific student possible, it cannot be released.

**What about school directories that include student information?**

Schools are allowed to release directory information about their students. At the beginning of the school year, a school must provide parents with written notification of what data the school considers to be directory information. If parents do not want any or all of this information released, they can notify the school in writing. Directory information normally includes a student's name; whether the student has achieved any academic or school honors, belongs to any school clubs, or is participating in extracurricular activities; student height, weight, and position played if the student is participating in sports; and the instrument played if the student is in band.

Some schools also add student addresses and telephone numbers to their directories. We do not recommend this practice. Besides making it too easy for someone who may wish the student harm to locate him or her, it also makes the students and their parents fair game for health and life insurance salespeople or other solicitors.

Outside of directory information, school personnel should not release information about one student to another student or to that other student's family. We would not even recommend giving out addresses and telephone numbers to another student's parents if that information is not in your school directory. Instead, facilitate school distribution of invitations or other communications. Some schools have even adopted internal "postal systems" as a teaching device which also facilitates communications.

Parental requests for information about students other than their own children often revolve around a disciplinary incident. Often, their child and another were involved in misconduct and they want to make sure either that their child was not punished more harshly than the other child or that the other student was adequately punished if their child was the victim. In either case, a teacher should only make vague statements, such as "the matter has not been resolved yet" or "the school disciplinary policy was followed." If the parents persist, simply direct them to the appropriate administrator, who will also tell them that they cannot be told any details.

## Staff Access to Student Information

**A student in my high school algebra class is dating my son. I would really like to know how she is doing in her English class and whether she had any discipline problems when she was in junior high. May I have access to her student files to review this information?**

Generally, no.

The Family Educational Rights and Privacy Act recognizes that school personnel need access to the records of current students in order to adequately provide educational programming and disciplinary assistance. However, even school personnel cannot access student records for personal reasons. **School personnel have access to student records on a need-to-know basis. If you do not need to know, you do not have access.** An attendance clerk would have access to student attendance data as part of his or her job. The clerk does not, however, need access to a student's grades in order to determine whether the student missed eight or ten days during the last semester.

Normally, a math teacher would not need to know how a student was doing in an English class, and there would seldom be any justification for a classroom teacher receiving information on a student's grades and discipline record at a previous school. The dean of students, however, could have a legitimate need for this information when determining what form of discipline might work well for the student. If the student is a special education student and the math teacher was a part of the Individualized Education Plan (IEP) Team, then access to a great deal of student information would be justified, within the team meeting, to allow the teacher to participate fully and knowledgeably in the IEP preparation. If the math teacher was concerned that the student did not do well on word problems and may have had a reading disability, it would not only be acceptable, but desirable to discuss the matter with the English teacher and to consider a joint referral for special education evaluation. Even then, however, the math teacher would have no real need to know the student's English grade.

In conclusion, access to student records may be necessary to effectively teach or discipline a student. However, a teacher may clearly not have access to a student's records for personal reasons, such as checking up on a son's girlfriend's achievements.

# PART 4

# Special Education

Chapter 4-1 An Overview of Legislation and Legal Precedents

4-2 Before You Discipline a Special Education Student

4-3 Discipline Recommendations

## Chapter
## 4-1

# An Overview of Legislation and Legal Precedents

As late as the 1960s, many of our nation's public schools routinely denied educational services to many disabled students or provided, at most, warehousing or caretaking services. Gentle children with Down's Syndrome would be prohibited from receiving a public education because they were "too disruptive." These children were also more likely to receive harsher punishment than regular education students when they misbehaved. Because of this widespread and harmful discrimination against children with special educational needs, the United States Congress passed a number of statutes that mandate how public schools will provide educational services to students with special needs. This chapter provides a chronological overview of the legislation and the legal precedents that affect a school's legal responsibilities concerning the discipline of special education students.

## Legislation

In 1975, Congress passed the Education of All Handicapped Children Act (EHA). This act placed affirmative obligations on school districts to provide free, appropriate public education to disabled students. The act was required because many school districts had refused to provide educational services of any nature to disabled students

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**Individuals with Disabilities Education Act**

or had "warehoused" the students and provided them with limited and often inappropriate services. Later, this act was revised as the Individuals with Disabilities Education Act (IDEA) in 1968. This act included a name change and amendments to the EHA concerning the extent of the required services, the manner in which the services were to be provided, and the rights of parents and students to seek enforcement of the act's mandates.

**IDEA Reauthorization Act**

The Individuals with Disabilities Education Act Amendments of 1997 update IDEA and are commonly referred to as the "Reauthorization Act." The Reauthorization Act extended the provisions of the IDEA beyond 1997 and included numerous amendments to the special education services that are required, how they are to be provided, and the rights of parents and students. Also included were significant differences in the restrictions on discipline of special education students. Related legislation that prohibits discrimination against people with disabilities generally also restricts the actions of public and private schools toward such individuals. This legislation includes the 1990 Americans with Disabilities Act (ADA) and Section 504 of the 1973 Rehabilitation Act.

**ADA and the Rehabilitation Act**

The cumulative effect of these statutes is to prohibit schools from treating students differently because they are disabled and to mandate that schools provide special services to children who have special needs. Because some schools have not provided adequate educational services to children with special needs and have disciplined these children more harshly than regular education students, these statutes place severe restrictions on the ability of public schools to discipline disabled children. Whether or not one believes the pendulum may have swung too far in the opposite direction, the restrictions imposed by Congress and the federal and state court systems must be followed before a disabled student can be disciplined for misconduct in school.

## *Honig v. Doe* (1988)

One pivotal case concerning discipline of special education students was *Honig v. Doe* (1988). This case considered the efforts of a school district to expel two emotionally disabled students for violent behavior toward fellow students that was clearly related to their disabling conditions. One of the student's individual education plans (IEP) had noted the need for improvement in his ability to relate to his peers and to cope with frustrating situations without resorting to aggressive acts.

**Stay Put Rule**

The school district tried to convince the Supreme Court that this student's misbehavior constituted a "dangerousness" exception to the stay put rule, which provides that during a special education due process proceeding, unless the parents and the school agree to an alternative placement, the student must "stay put" in his or her current educational placement until the special education due process proceeding, including judicial appeals, is completely resolved.

The court gave short shrift to this claim, stating its opinion that "Congress very much meant to strip schools of the unilateral authority they had traditionally employed to exclude disabled students, particularly emotionally disturbed students, from school." Although Congress did not "leave school administrators powerless to deal with dangerous students," it did direct that "the removal of disabled students could be accomplished only with the permission of the parents or, as a last resort, the courts" (108 S.Ct. at 604).

The Supreme Court clearly curtailed the use of long-term suspension or expulsion as a form of discipline for disabled students, stating its belief that educators could use other disciplinary options that "may include the use of study carrels, time-outs, detention, or the restriction of privileges." The court also accepted the interpretation of the Department of Education's Office of Civil Rights that an out-of-school suspension of 10 school days or less did not constitute a change of placement and could be done unilaterally by the school, following a due process hearing, without regard to whether the behavior was related to the disabling condition.

## Three Methods for Handling Serious Discipline Problems

**Three methods for handling serious discipline problems.** Some discipline problems are, however, simply too serious to be handled with only a 10-day suspension, let alone study carrels and time-outs. For these problems, the Supreme Court provided three methods for disciplining disabled students through long-term suspensions of 11 or more school days or expulsion.

In the first method, the school persuades the parents to agree to a long-term suspension or to a mutually agreeable interim placement pending the outcome of the suspension or expulsion process.

In the second method, the school uses the due process procedure for working with special education students to change the child's placement to a long-term suspension or expulsion or to a more restrictive placement that provides greater safety for the staff and other students.

In the third method, the school district seeks injunctive relief from the courts, with the court authorizing the removal of the student from the current school setting.

The administrative proceedings in the second method normally have to be completed before the judicial review of the third method is possible. However, the administrative process may be bypassed when administrative remedies would be futile or inadequate. The Supreme Court determined that this legal principle could apply to schools, as well as parents, and held that Congress did not preclude the courts from making a unilateral decision to remove a disabled student from his or her current educational placement.

*The Supreme Court has placed severe restrictions on the use of long-term suspensions.*

Although the Supreme Court preserved the option of a court-ordered long-term suspension, it has placed severe restrictions on its use, stating that the school must "demonstrate the futility or inadequacy of administrative review" and show "that maintaining the child in his or her current placement is substantially likely to result in injury to himself or herself, or to others" (108 S.Ct. at 606).

## Reauthorization Act (1997)

These judicial restrictions have been further modified by the 1997 Reauthorization Act that amended the IDEA. Even the definition of a free, appropriate public education now contains references to discipline. Part A of the IDEA now states that "a free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school" (Section 612[a][1][A]).

Required Data Analysis

**Required data analysis to find discrepancies in discipline.** These amendments now require each state educational agency to examine data from individual school districts, which are referred to as local educational agencies (LEAs), to find any significant discrepancies in the rate of long-term suspensions and expulsions of children with disabilities among the various LEAs, or when compared to the rates of long-term suspension or expulsion for nondisabled children. The state educational agency is required to review any discrepancies and revise its (or the LEA's) procedures and practices relating to the development and implementation of IEPs, behavioral interventions, and procedural safeguards to ensure that such policies, procedures, and practices comply with the IDEA.

Transferring Students

**Transferring students with disabilities.** Congress has also addressed the problems that can occur when a student with disabilities transfers from one school to another school, without a corresponding transfer of the student's disciplinary history. If the new school does not know the student's pattern of or propensity toward misconduct, it will be difficult for the school to take steps to avoid future misconduct. As a result, the Reauthorization Act includes the following provision:

> *DISCIPLINARY INFORMATION—The State may require that a local educational agency include in the records of a child with a disability a statement of any current or previous disciplinary action that has been taken against the child and transmit such statement to the same extent that such disciplinary information*

*is included in, and transmitted with, the student records of nondisabled children. The statement may include a description of any behavior engaged in by the child that required disciplinary action, a description of the disciplinary action taken, and any other information that is relevant to the safety of the child and other individuals involved with the child. If the State adopts such a policy, and the child transfers from one school to another, the transmission of any of the child's records must include both the child's current individualized education program and any such statement of current or previous disciplinary action that has been taken against the child.*

Alternative Settings

**Preference for alternative educational settings.** Congress is placing increased emphasis on alternative educational settings, with a clear preference for these over suspensions or expulsions. Even a special education student whose behavior does not relate to the disabling condition may not be given a long-term suspension or expelled if the suspension or expulsion involves a cessation of services. The most the school can do is to suspend or expel the student from the current school of attendance and to place the student in an alternative educational setting that offers substantially similar classes and services and implements the same IEP. Because IDEA prohibits a change in educational placement, not physical location, the alternative educational setting can be imposed for the special education student whose misbehavior does not relate to the disability.

## Schools Can Discipline

*Under the* Goss v. Lopez *(1975) decision, administrators can impose a suspension of 10 school days or less on a special education student, regardless of whether the misbehavior relates to the disabling condition.*

The Supreme Court in *Honig v. Doe* and Congress in the Reauthorization Act did note that schools are not prohibited from disciplining special education students. One option that the Court acknowledged was a short-term out-of-school suspension. Under the *Goss v. Lopez* (1975) decision, administrators can impose a suspension of 10 school days or less on a special education student, regardless of whether the misbehavior relates to the disabling condition. Thus, even a seriously emotionally disabled student could be given a five-day out-of-school suspension following a fight or assault.

Short-Term Suspensions

**Limited short-term suspensions.** However, the United States Department of Education's Office of Civil Rights (OCR) has limited the use of short-term suspensions by announcing that a series of short suspensions cannot be used to avoid the Supreme Court's prohibition of suspensions of 11 school days or longer by creating a *de facto* change of placement. For example, suspending a child several times during a school year for eight or nine days at a time would amount to a significant change in placement. Conversely, a series of suspensions that, in their entirety, are for a total of 10 school days or less would not be considered a significant change in placement. Among the factors that should be considered in determining whether a series of suspensions has resulted in a "significant change in placement" are the length of each suspension, the proximity of the suspensions to one another, and the total amount of time the child is excluded from school.

Exceptions to Suspensions

**Exceptions to 11-day suspensions.** Congress has provided limited exceptions to the prohibition against 11-day out-of-school suspensions when a child's behavior is a manifestation of his or her disabling condition. A school may unilaterally transfer a student with a disability to an alternative educational setting for a period not to exceed 45 days (1) if a student without a disability would be subject to equal or greater discipline *and* (2) if either (a) the student carries a weapon to school or to a school function or (b) the student knowingly possessed or used illegal drugs or sold or solicited the sale of a controlled substance while at school or at a school function.

Either before taking this disciplinary action, or within 10 days of taking the action, the school's IEP team must review the behavioral intervention plan and modify it as necessary to address the misbehavior. If the IEP did not contain a behavioral plan, the school must conduct a functional behavioral assessment and implement a behavioral intervention plan within that 10-day period.

### Change of Placement Hearing

**Expedited hearing to change placement.** Even for behavior that is substantially likely to result in injury to the child or to others, a school may not unilaterally place a student with a disability in an alternative educational setting for more than 10 school days. The school may, however, seek an expedited hearing before a hearing officer to obtain the hearing officer's order to change the placement to an appropriate interim alternative placement for a period not to exceed 45 days.

In such a hearing, the school must demonstrate by substantial evidence (more than a preponderance of the evidence) that maintaining the current placement of the child is substantially likely to result in injury to the child or to others. There are two basic standards to which a judge or jury considers evidence. In a criminal proceeding, the standard is "beyond a reasonable doubt." Before a judge or jury can convict a defendant based on this very high standard, it has to be as convinced about this evidence as it would be about the evidence to make a major life decision, such as a decision to buy a house. In civil trials, the standard is "by a preponderance of the evidence." This standard simply requires that there is more evidence to support one side than there is to support the other. Thus, if the judge or jury finds that 50.01% of the evidence supports the plaintiff, then it would rule for the plaintiff.

In change of placement hearings, the hearing officer is required to consider the appropriateness of the student's current educational placement; to consider the efforts the school has made to minimize the risk of harm in the current placement, including the use of supplementary aids and services; and to determine whether the temporary alternative educational setting enables the child to continue to participate in the general curriculum and to receive the services of his or her current IEP. (See Part A, Section 615[k][2], of the IDEA.)

### Selecting an Alternative Setting

**Selecting an alternative educational setting.** If a student with a disability is placed in an alternative educational setting for either 10 days or less or for up to 45 days, the IEP team must select the alternative educational setting dent to continue to participate in the general curriculum, to receive those services and modifications included in the current IEP, and to receive services and modifications designed to address the behavior which resulted in the alternative placement. (See Part A, Section 615[k][3], of the IDEA.)

Presumably, Congress did not place a limit on the option of judicial relief mentioned in *Honig v. Doe.* As discussed previously, however, this is a very limited option.

A Change of Site, Not Placement

**A change of site may not be a change in placement.** In addition, a number of courts have ruled that a change in the site of service delivery is not a change in placement if the new site offers substantially similar classes and services and implements the same IEP. According to these courts, IDEA prohibits a change in educational placement, not physical location. See *Weil v. Board of Elementary and Secondary Education* (1991). In *Lunceford v. District of Columbia Board of Education* (1984), the Court of Appeals held that there must be, at a minimum, a fundamental change in or elimination of a basic element of the education program in order for the change to qualify as a change in educational placement.

## Summary

Permissible discipline of special education students differs from that of regular education students in several ways. Legislation and legal precedent has placed severe restrictions on the ability of public schools to discipline disabled children. The restrictions placed on long-term suspension and expulsion set the tone for restrictions on how schools can discipline disabled children when they misbehave. While a school's ability to impose a long-term suspension or expel a disabled student has been curtailed, the Supreme Court has encouraged schools to use other disciplinary options, such as the use of study carrels. Serious discipline problems, however, may be handled with suspension or expulsion under certain circumstances.

There are two overarching principles behind the legislation and legal precedents that affect a school's ability to discipline special education students. First, students with special needs must not be deprived through disciplinary action of the services they require and the education they are due. Second, discipline of a special education student must be consistent with the discipline a general education student would be given for the same misbehavior. No student with a disability can face suspension or expulsion except for an offense that subjects all students to suspension and expulsion. A student with a disability cannot be placed in an alternative educational setting for a longer period than a nondisabled student could be suspended under the policy. Thus, if the student discipline code calls for a maximum of a five-day out-of-school suspension for cursing at a teacher, a student with a disability cannot be suspended or placed in an alternative educational setting for more than five days.

## Two Principles

1. *Students with special needs must not be deprived of an education and required services.*
2. *Discipline of special education students must be consistent with discipline of general education students.*

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## Chapter 4-2

# Before You Discipline a Special Education Student

Is the misbehavior related to the disability? This is the most important question you must answer before considering discipline for a special education student. If the behavior is not related to the student's disabling condition, the school's choice of discipline must be consistent with the legislation and legal precedents reviewed in Chapter 4-1. If the behavior is related, the school's disciplinary options will be further restricted.

Asking if the behavior is a manifestation of the disabling condition is referred to as a manifestation determination. This is often a difficult question to answer. In some cases, the behavior will clearly relate to the disability. If an emotionally disabled student acts out in frustration and curses at a teacher, the behavior is almost certainly related to the disability. If a mentally disabled 17-year-old student with the intellectual age of a three-year-old hits another student in frustration, the behavior is also related to the disability. In either case, a long-term suspension is not a legal option.

There are cases, however, in which the courts might be willing to agree that the behavior does not relate to the disabling condition. If a hearing-impaired student sells cocaine on campus, the school can make a strong argument that the misconduct is simply misconduct. If a paraplegic

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student brings a gun on campus and attempts to shoot a fellow student, the school would be in a strong position to argue that there is no relationship between the disability and the misconduct.

*Asking if the behavior is a manifestation of the disabling condition is referred to as a manifestation determination.*

However, many disciplinary infractions by special education students fall into a gray area. If a student with a learning disability is persuaded to act as a "mule" and transport drugs for other students, is the behavior motivated by the student's low self-image and reduced reasoning ability? If a hearing-impaired student hits another student because she thought the student was saying bad things about her behind her back, is the behavior related to her disability? If a mentally disabled student tries to "fit in" by taking drugs, does the behavior relate to his disabling condition?

### Hold a Multi-Disciplinary Conference

The decision as to whether a student's behavior is related to his or her disabling condition must be made by educators with specialized knowledge—not by members of the administration or the school's governing board. In addition, the school must hold a multi-disciplinary conference (MDC) similar to the one held to decide whether a student has a special education disabling condition or what an appropriate placement would be. The MDC conference should include members of the student's IEP team, including, as needed, the special education teacher(s), regular education teacher(s), an administrator, a psychologist, a speech and language therapist, a physical therapist, and the parent(s) or guardian(s), etc.

### IDEA Requirements

Part A, Section 615(k)(4), of the IDEA includes additional requirements for the manifestation determination review by the IEP team. No later than the day that the school decides to suspend a student with disabilities or to assign the student to an alternative educational placement, the school must notify the student's parents of the decision and of all the procedural safeguards required by the IDEA. In addition, immediately, if possible, but no later than 10 school days after the date of the decision to suspend or transfer the student, a review must be conducted to examine the relationship between the child's disability and the behavior subject to the disciplinary action.

The IEP team conducting the manifestation determination review may determine that the behavior is not a manifestation of the disability only if it first considers all relevant information, including evaluation and diagnostic results, including those provided by the parents; observations of the student by staff and others; and the student's IEP and placement. As it does so, the IEP team must address four questions:

**Answer Four Questions**

1. Is the student's placement appropriate?
2. Are the special education services provided to the student consistent with the student's IEP and placement?
3. Does the student's disability impair his or her ability to understand the impact and consequences of the misbehavior?
4. Does the student's disability impair his or her ability to control the misbehavior?

If the IEP team determines that the student's placement was inappropriate, the reasonable response would be to move the student to the appropriate placement, rather than suspend or expel the student. If the placement was inappropriate, there will be a judicial presumption that the placement contributed to the misconduct. If the IEP team determines that appropriate special education services were not provided in accordance with the student's IEP and behavioral plan, the reasonable response would be to comply with the student's IEP and behavioral plan—not to seek suspension or expulsion.

If the IEP team determines that the IEP, placement, and implementation were appropriate, then it must determine whether the child's disability impaired his or her ability to understand the impact and consequences of the misbehavior. Finally, the IEP team must determine whether the student's disability impaired his or her ability to control the misbehavior. In short, the IEP team must determine whether the misbehavior of the student with a disability is related to his or her disability in some way or is simply an act of misbehavior. (See Part A, Section 615[k][4][C], of the IDEA.)

If the IEP team makes all of the required findings and determines that the student's behavior was not a manifestation of the disabling condition, then the student with a disability is subject to the same disciplinary procedures applicable to students without disabilities with the exception that the student must continue to receive a free, appropriate public education. (See Part A, Section 615[k][5], of the IDEA.)

If the parents disagree with the IEP team's manifestation determination, they can request an expedited hearing in which the hearing officer determines whether the school has demonstrated that the student's behavior was not a manifestation of the disability. In reviewing the decision, the hearing officer must decide whether the alternative educational placement allows the student to participate in the general curriculum, although in a different setting, and to continue to receive the services and modifications of his or her IEP, including the behavior intervention plan.

Degree of Dangerousness

**Degree of dangerousness.** If the IEP team determines that the misbehavior is related to the disability, the team needs to consider the misbehavior's degree of dangerousness. If the child poses a danger to him- or herself or others, the team should determine what placement would be restrictive enough to allow the student to receive educational benefits while protecting the student and/or others. The team should then try to convince the parents to agree to this placement. If the parents refuse, the school can petition for an expedited hearing and seek up to 45 days of an alternative educational placement for the student. This will give the school time to request a judicial injunction for an extended alternative educational setting, pending actual placement in the more restrictive setting. In the alternative, the school may consider making a unilateral placement in the more restrictive setting, based on the degree of dangerousness, and then seeking judicial approval, as was done successfully in *Victoria L. v. District School Board* (1984) and *Jackson v. Franklin County School Board* (1985).

A different approach is needed if the child's misconduct relates to his or her disability, but is disruptive rather than dangerous. Again, it is important for the IEP team to develop a plan and identify an appropriate setting for modifying the student's behavior, and then try to convince the parent(s) to accept the plan. If they agree, the plan can be implemented without legal concerns. If the parents do not agree, the school is likely to prevail on its unilateral modifications if they do not affect the student's learning experiences in a significant way. (See *Brookline School Committee v. Golden,* 1986.) Courts have held that the term educational placement "refers only to the general education program in which the disabled child is placed and not to all the various adjustments in that program that the educational agency in the traditional exercise of its discretion may determine necessary." (See *Concerned Parents v. New York City Board of Education,* 1980.)

*A different approach is needed if the child's misconduct relates to his or her disability, but is disruptive rather than dangerous.*

This brief summary of the review and evaluation process the IEP team must complete before a special education student is disciplined illustrates the care a school must take in handling an incident involving misconduct by a student with disabilities. As with all disciplinary issues with serious legal consequences, you should always check with your school's legal counsel before implementing student discipline of special education students.

Chapter

4-3

# Discipline Recommendations

The preceding chapters are important to the classroom teacher for two reasons. First, they explain why the school cannot just remove a dangerous or disruptive student who also has a disability. Second, they set the legal tone for what a classroom teacher may and may not do to help a special needs student comply with rules of behavior. Discipline for special education students serves the same purpose as discipline for regular education students: to create a safe environment in which the child and other students can receive educational services without interference.

## Unacceptable Discipline

Corporal punishment is never a safe, legal, or effective form of discipline for special education students. Although pain is an aversive that can modify behavior, striking a special education student is almost guaranteed to cause more harm than benefit. The use of pain as a deterrent holds an unacceptable risk of causing psychological or physical injury to the child and is likely to cause an extremely adverse reaction from both the parents of the child and the general public with, at best, mixed success in eliminating the undesirable behavior.

## Acceptable Forms of Discipline

Other forms of discipline are more commonly accepted by both the public and the legal system and can be very

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useful in modifying the child's behavior. In *Honig v. Doe*, the Supreme Court specifically mentioned the use of study carrels, time-outs, detention, or the restriction of privileges as acceptable disciplinary options. These options are based on the concept of denying a student access to the positive reinforcement of teacher and peer contact and the enjoyment of classroom activities. Detention traditionally involves separating a student from the normal classroom setting for an extended period of time—a class period, a day, or a week. The detention period is normally highly structured, requiring the student to perform his or her schoolwork without the pleasant aspects of school, including recess, breaks between class periods, lunch with other students, etc. Detention is less intrusive to the student's education than out-of-school suspension, but a school must still ensure that it has not been used so often as to constitute a *de facto* change of placement.

*Detention is less intrusive to the student's education than out-of-school suspension, but a school must still ensure that its use does not constitute a* de facto *change of placement.*

## Detention or Time-Outs?

**Detention or time-outs?** Detention is far less effective with low-functioning disabled students, who may benefit more from time-outs. A time-out is normally for a few minutes at a time and can involve removing the student to a separate room or a designated area of the normal classroom. Time-out can be a deterrent and it can also be used as a cooling-off period to help a child regain self-control. Arrangements can also be made in a child's IEP for sending the child home for the rest of the day, if needed, as a cooling-off period. Care should be taken that the time-out area is not locked and that it is not so small, dark, or cramped as to be construed as a closet. Care should also be taken to ensure proper supervision of the child in time-out so that he or she does not get hurt.

Time-out is a generally accepted practice for dealing with both disabled students and young students. Courts have rejected legal challenges to the use of time-outs as long as the school follows reasonable professional standards and does not use time-out for excessive periods or in an unsafe or abusive manner. (See *Dickens v. Johnson County Board of Education*, 1987, and *Hayes v. Unified School District No. 377*, 1987.)

**Withdrawal of Privileges**

**Withdrawal of privileges.** Normal classroom discipline is both legally and educationally applicable to special education students. The possibility of withdrawing privileges, such as recess or a field trip, can be a powerful motivator for both regular and special needs students. Granting privileges for good behavior can also be highly effective. As the classroom teacher, review possible rewards and punishments and use those that are likely to work with each individual child.

**Aversives**

**Aversives.** Disabled children will sometimes engage in behaviors that are dangerous, such as banging their heads against walls or concrete floors or scratching at themselves until they bleed. Other self-stimulating behaviors can limit their ability to learn. Still other adverse behaviors, such as spitting, can affect their interactions with teachers and peers. Although these behaviors need to be reduced or eliminated for the child's sake, they may not respond to time-out, detention, or the withdrawal of privileges.

If this is the case, consult with members of the student's IEP team for ways to handle the behavior that would be consistent with the student's IEP and would respect the student's dignity. One behavior modification strategy involves conditioning the student to associate an unpleasant sensory experience with the unwanted behavior. For example, you might present a substance with a noxious smell each time the unwanted behavior occurs. In this way, unpleasant physical stimulation can be used to control unwanted behavior. Before using any sensory stimulation to deter a special needs student from unacceptable behavior, the district should check with its medical consultants to determine that the substance will not harm the particular student. A description of the aversive and guidelines for using it should be placed in the child's IEP before implementation.

## Document Rules in the IEP

The rules the child is expected to obey should be a part of the child's IEP. The extent of the rules depends on the child's abilities. A child with a learning disability should follow every part of the student code of conduct, while a child who is mentally disabled should be expected to follow only a few simple rules. Options for disciplining the child should also be placed in the child's IEP. A learning disabled child might be subject to the full range of school discipline, while even a one-day out-of-school suspension might be inappropriate for a mentally disabled child who would not understand or benefit from the discipline.

Individualizing the rules of conduct and the consequences for their breach to the disabled child's needs will increase the probability that the discipline will be successful, the parents will accept the discipline, and the courts will uphold the discipline if it is challenged.

*A child with a learning disability should follow every part of the student code of conduct, while a child who is mentally disabled should be expected to follow only a few simple rules.*

# PART 5

# Sexual Harassment

Chapter 5-1 What Is Sexual Harassment?

5-2 Strategies for Addressing Sexual Harassment

5-3 Investigating Claims of Sexual Harassment

5-4 Sexual Harassment Policies and Consequences

5-5 Protecting Yourself against Allegations of Sexual Harassment

Case Studies Discussing Sex, Politics, and Religion

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## Chapter

## 5-1

# What Is Sexual Harassment?

Sexual harassment is one of the most prevalent forms of violence found in our schools. There is a shocking tendency to dismiss sexual harassment as another rite of passage—a natural consequence of the tendency of boys to be boys. Like acts of violence, sexual harassment occurs on many different levels and can leave wounds that extend far beyond any physical healing that is required.

## Sexual Harassment Is Not . . .

First and foremost, we must understand that sexual harassment is not a harmless prank. It is not teenage courtship, nor is it the product of hysterical overreaction. Sexual harassment is seldom about sex, just as rape is seldom about sex. Sexual harassment is about having power and control over another person. Many who deliberately engage in sexually harassing behaviors do not intend to have the incident result in sexual intercourse. Instead, the harasser seeks the satisfaction of having the power to make another person uncomfortable.

Sexual harassment is not limited to boys harassing girls. Girls can sexually harass boys and other girls, and boys can sexually harass other boys. While each gender can harass members of the other gender, sexual harassment most commonly occurs between a male harasser and a female victim. Therefore, most of our examples reflect this statistical reality.

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## Sexual Harassment Is . . .

Sexual harassment is defined by the courts as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature. Students have defined sexual harassment as unwanted or unwelcome sexual behavior that interferes with their lives.

### Hostile Academic Environment

The most common form of sexual harassment in schools is referred to as a hostile academic environment. Most of this sexual harassment is verbal. Risqué or dirty jokes and off-color, obscene, or vulgar words and statements are pandemic. Unwanted propositions or other requests for sexual favors are prime harassing behavior. This includes unwanted sexual compliments. Sexual compliments are never appropriate outside of a private setting or in a completely consensual and age-appropriate dating or sexual relationship. It is *never* appropriate for a staff member to comment on a student's sexual practices or to compliment a student on his or her sexual attractiveness or that of his or her attire.

*Sexual harassment is about having power and control over another person.*

It is not sexual harassment for one student to ask another student out on a date. It is sexual harassment if the requests persist after the student has been turned down. A rule of reason applies, but "manly" persistence is not acceptable. If a rejection is ambiguous or seems reluctant, it would not be harassment to ask again in a week or so. If a request for a date is turned down in the first week of school, it is not harassment to ask again six months later after both parties know each other better. It is harassment if the answer is a clear no and that no is not respected or if the requests continue after a series of negative responses.

### Excessive Flirting

Excessive flirting is also prohibited harassment. Any flirting by faculty toward students is extremely dangerous behavior. Highly personal questions or unwanted telephone calls can be a part of the pattern of harassment, as are unwanted notes with a personal or sexual message. Wolf whistles and other suggestive sounds also create a potentially hostile environment.

**Threats**

Threats are the clearest form of verbal harassment. The threat can be of a physical attack or a verbal attack on the reputation of the victim. Students writing other students' names and telephone numbers—and indicating their willingness to engage in sexual activities—on restroom walls is serious sexual harassment. The failure of the school to take corrective action against such graffiti is the basis for serious legal liability.

**Visual**

Sexual harassment can also be visual. Leers, staring, and looking people up and down all constitute forms of sexual harassment. Suggestive, violent, or sexual photographs, pin-ups, or cartoons can constitute a hostile academic environment. Wearing inappropriately revealing attire can also constitute sexual harassment.

**Physical**

Sexual harassment also has a pervasive physical component. It is axiomatic that sexual assault is the most severe form of sexual harassment. Assault of a nonsexual nature, but for a sexually harassing reason, is also extremely serious—such as the rejection of an advance resulting in a slap, a kick, or a serious beating or attack with a weapon. Any unwanted and/or public touching of the "private parts," including hips and buttocks, is prohibited. A student touching him- or herself in a sexual manner or touching another person in a sexual manner with his or her consent while in the presence or view of others is as much a form of sexual harassment as touching another person in a sexual manner against his or her will.

Harassers can also victimize with unwanted touching on any part of the body. A caress on the cheek from a loved one is wonderful. A caress on the cheek from someone you do not want touching you is a serious invasion of your personal space and privacy. Intentional brushing against another person is a form of "cheap thrill" at the expense of another. Standing too close to another person creates discomfort as do excessively lengthy handshakes. Blocking or cornering movements are a method of gaining physical control over another person, as are unwanted back rubs, neck rubs, patting, or "playing footsies."

## Tests for Recognizing Sexual Harassment

As educators, we need to recognize behavior on our part which could inadvertently create a hostile academic environment and behavior on the part of others which we must be diligent to eliminate. We will start with the standard legal tests and then give you some practical guidelines for determining what kind of behavior is prohibited.

### Legal Guidelines

The legal guidelines for sexual harassment first require that the behavior or language is unwanted. If a student couple is dating and want to hold hands on campus, this is not sexual harassment and is acceptable, if it does not violate your school's demonstration of physical affection rules. On the other hand, if the hand-holding is unwanted for any reason, it is prohibited. The boy or girl may not want to hold hands with someone other than the person they are dating. They have this right. They may be having a fight or breaking up with the person they held hands with for the previous six months. They now have the right not to hold hands. If physical contact is unwanted—either from a particular person at a particular time, or at all times—it is prohibited.

A second legal guideline is that the behavior must be reasonably offensive to the victim(s) and/or fellow students or coworkers. This is determined in two stages. The first stage determines whether the action is reasonably offensive. Using crude sexual language as a girl walks past in the hallway is reasonably offensive. Having a model of the Washington Monument in a history classroom is not, despite a claim that it is a phallic symbol. However, an otherwise harmless object can be given a sexual overtone. It would be reasonably offensive for a teacher to stroke the model of the Washington Monument in a suggestive way while leering at a student. The second stage involves judicial recognition that the standard of "reasonably offensive" must be measured by the victim, not the harasser. If the victim is a 16-year-old female high school student, the standard of reasonableness is measured by 16-year-old female high school students, not by 30-year-old male teachers.

A third legal guideline in measuring whether a behavior is harassing considers the frequency and serious nature of the behavior. If the behavior is extremely serious, such as a sexual assault, then it is illegal on the first occasion. On the other hand, if the behavior is not as serious, but is pervasive, it would also constitute sexual harassment. Constantly referring to students as "honey" and "sweetie" should result in discipline to stop the behavior.

Other factors found in harassing behavior include a subtle or blatant disrespect for the victim and an element of intimidation. It is difficult for victims to discourage and stop deliberate harassers.

We would add the following practical tests to the legal guidelines for determining if your behavior is harassing in nature. These tests can also be useful in helping students understand if their actions are improper:

- Would you do the act or make the statement if your mother or grandmother were watching? If your superintendent or board president or, in the case of a student, if a teacher were watching? If the answer is no, the behavior is inappropriate.
- Would the words or actions upset you if they were directed to your girlfriend or boyfriend, wife or husband, brother or sister, mother or father? If the answer is yes, the behavior is inappropriate.

The final test may be particularly helpful for male students and staff:

- Would the actions or statements bother you if another male directed them toward you? If the answer is yes, the behavior is inappropriate.

### Three-Step Test

1. *Is the behavior unwanted?*
2. *Is the behavior reasonably offensive to the victim?*
3. *How often does the behavior occur, and how serious is it?*

## Sexual Harassment Is Commonly Not Reported

Victims of sexual harassment, particularly students, are reluctant to report it for a number of reasons. This reluctance becomes even more pronounced when the harasser is a faculty or staff member. First, victims may not know that the harassment is illegal—or that they have a possible remedy if

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they report. Second, students may be uncomfortable with an adult's behavior or language, but may assume that it cannot be wrong because the adult is a teacher or an administrator. Third, victims may worry about what will happen if they report: "If I report the harassment, Mr. Jones will get fired, and his family needs his income." "If I report the harassment, Jimmy will get kicked off the football team and not get a scholarship to college, or the team will not make the state playoffs."

Fear is the most common reason why student and adult victims do not report sexual harassment. Victims fear they will not be believed. A student will fear that her report of harassment against a senior faculty member will be discounted and superficially investigated, if at all. Smart predators, student and adult alike, often pick victims who lack self-confidence; do not have a solid support group of family, friends, or faculty; or have a reputation as "bad" or "troubled" students. Students who are regularly in trouble or have a reputation for being sexually active can be particularly reluctant to press a claim of harassment. After all, who would believe them?

*The fear of humiliation is sometimes an almost insurmountable barrier to a child who is a victim of sexual harassment.*

Other fears must also be understood. Student victims of sexual harassment are not adults. They do not have the adult range of emotions and experiences to help them handle unpleasant encounters. Sexual issues are among the most private matters in our lives. Even most adults are uncomfortable discussing their personal sexual activity, let alone their victimization in a sexual manner. This embarrassment is compounded when the victim is a child. The fear of humiliation is sometimes an almost insurmountable barrier to a child who is a victim of sexual harassment. Like adults, student victims also face the fear of ostracism. If the harasser is a popular teacher, a star athlete, or a member of the "in crowd," the fear of being frozen out of school society is very real and often well-founded.

Finally, victims of sexual harassment fear retaliation and damage to their futures. If the harasser is a faculty member, the student's decision to not report harassment may result from the fear of revenge through grade reduction, elimination from or reduction of playing time in extracurricular activities, and/or loss of college references, etc.

## Do Not Ignore—Do Not Encourage

One of the most discouraging aspects of academic sexual harassment is how commonly it is ignored. There is a tendency to ignore improper comments or horseplay of a sexual nature. Some schools even perpetuate the ridicule of girls by allowing assemblies where teenage boys put balloons and basketballs under their shirts to act out the role of cheerleaders.

## Real Damages—Real Trauma

The visible damage caused by a violent assault is usually clear and easily recognized as serious. When a student has been beaten or shot, it is easy for us to recognize the problem and extend our help, understanding, and sympathy to the victim. Our problem is that, as educators, we too often suffer from society's blind spots. Failing to recognize the damage caused by sexual harassment is one of those blind spots.

Let us consider the damage that unchecked sexual harassment does to our male students. As educators, our responsibilities extend far beyond teaching reading, writing, and arithmetic. We also teach students the rules of basic behavior and the basic premises upon which our democratic culture is founded. We must take responsibility for the socialization that occurs in our schools. If we ignore sexual harassment and sexual discrimination, we must take responsibility for implicitly stating that these behaviors are acceptable and that girls are not as valued or as important as boys.

*If we ignore sexual harassment and sexual discrimination, we must take responsibility for implicitly stating that these behaviors are acceptable and that girls are not as valued or as important as boys.*

If sexual harassment is allowed to continue, our victims are taught that they are not important, that their pain is not of interest, and that they are objects of entertainment rather than human beings with rights to a safe learning environment. The physical symptoms caused by unacknowledged emotional pain—stomachaches, headaches, and other illnesses—can lead to reduced attention in class, lower grades, and higher absenteeism and dropout rates. Victims learn not to aim high, and their loss of ambition costs both them and society.

## Who Are the Victims?

Everyone in the Environment

As with other forms of violence, the victims of sexual harassment include many more people than those who are directly involved. Left unchecked, sexual harassment makes a victim out of everyone in the environment. Those who commit acts of sexual harassment are victims. Students who neither engage in sexual harassment nor are its direct recipients also suffer. Those who witness unchallenged sexual harassment become victims of the environment of hostility toward girls and women that unchecked sexual harassment fosters. Doing nothing about sexual harassment sends a clear message that anger, prejudice, and hatred that devalues both genders will be tolerated. Unchallenged sexual harassment signals that females are not worthy of respect and that it is appropriate for males to exercise authority and dominion over them.

Unchecked Escalation

The giggles and taunts of early elementary school can escalate into crude propositions, gropes, and date rape if children are allowed to think that this form of bias is acceptable. Grabbing a girl by the hand or arm and not letting her go after she says she does not want to be held is not a normal expression of sexual energy and playfulness. Calling a girl a crude name or suggesting a lewd sexual act is not a normal part of courtship. Asking a girl for a date or a kiss after she has said no five times already is not admirable persistence. Allowing boys to laminate posters of scantily clad women in coeducational shop class is not artistic expression. Telling a girl she would look good without any clothing is not a compliment. All of these activities are forms of sexual harassment.

## Who Engages in Sexual Harassment?

Most students who suffer from sexual harassment are the victims of student-to-student harassment. However, a prevalent and particularly insidious form of sexual harassment is student harassment by faculty and staff members. This may include direct sexual assault, where the adult employee uses his or her position to intimidate the student into not reporting the attack. It may also include the *quid pro quo* form of sexual harassment—something for something. If you give me a kiss, I will give you an A on the quiz. If you engage in a sexual act, you will get a passing grade for the course.

Sexual harassment also includes "voluntary" sexual contact between students and adult school employees. Even though a student may be a willing, enthusiastic participant in a sexual or dating relationship with an administrator or teacher, he or she can never be a truly voluntary participant. Every state has laws that restrict the sexual contact between adults and children. Others place criminal sanctions for relationships between people in authority and those who are in their charge. These often include teachers and students, even when a student is otherwise of an age to consent to the activity.

Whether or not it is punishable under the criminal codes of the state, dating or sexual behavior between a student and a school employee are *never* acceptable—professionally or legally. School employees are in positions of professional and custodial responsibility for the students in the school. School employees, particularly teachers and administrators, are in a position to use their access and prestige to inappropriately influence children and adolescents who trust them and may even have romantic feelings for them.

*Whether or not it is punishable under the criminal codes of the state, dating or sexual behavior between a student and a school employee are* never *acceptable—professionally or legally.*

Chapter

5-2

# Strategies for Addressing Sexual Harassment

The most important step for each teacher, administrator, and staff member to take to eliminate a hostile climate is to communicate clearly that the attitudes underlying acts of sexual harassment will not be tolerated. Many of the following strategies for addressing sexual harassment provide different ways of communicating the school's rejection of the attitudes of harassment. Additional strategies may be found in Chapter 6-2, Strategies for Addressing Racial, Ethnic, and Religious Harassment.

## Teach the Teacher

Educators must understand how sexual harassment expresses itself and how to minimize its impact. Ongoing professional development activities should introduce and review what sexual harassment is, the school's policies regarding it, and how to avoid or eliminate situations in which it can occur. Educators need to clearly understand the problem before they can clearly discuss it with their students.

## Be Vigilant

Faculty and administrators should never ignore incidents of sexual harassment or be passive if the indicators

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of sexual harassment are present. Vigilance requires proactive responses. Correct a situation after the first incident, and you will send a clear message. Allow an incident to become a pattern of behavior, and you will have a more difficult time correcting the hostile environment that has developed.

*Clearly communicate that the attitudes underlying acts of sexual harassment will not be tolerated.*

Be willing to ask for help. If the problems are too serious for solutions at the classroom or school level, seek help within the district and community.

## Model Tolerance

If educators do not model tolerance, respect, courtesy, and fairness, how can they expect their students to use these skills in their interactions with each other and with them? Children do not respond well to a "do as I say, not as I do" teaching style. If we want tolerance, we have to show tolerance.

## Teach the Students

Students need to know what sexual harassment is in order to avoid it. Establish programs that define sexual harassment and teach students how to resist and report it. The programs also need to teach those who may sexually harass others how to value themselves, understand the pain their actions cause, and express their own self-worth without attacking another person's self-worth. This instruction should be incorporated into everyday classes—not just covered in special assemblies or lectures. These lessons are reinforced every time an educator stops a "harmless" joke or gag that is hurtful and degrading.

## Stress that No Means No

Recent studies have indicated that men and women may speak a different language in interactions that may have a sexual overtone. These studies claim that when women say things like "I don't think I am ready for this" or "I am interested in somebody else," they may think they are saying "no," while the man does not interpret this as a "no."

Whether or not men really do not understand or are intentionally dense, the study does underline the importance of teaching all students that if they do not want to be touched, kissed, dated, talked dirty to, or in any other way communicated to in a sexual nature, the only correct answer is a clear and loud "No—I do not want to do that." Students also need to be taught that no means no. It does not mean yes. It does not mean maybe. It does not mean keep trying. It means no.

*Students also need to be taught that no means no. It does not mean yes. It does not mean maybe. It does not mean keep trying. It means no.*

## Confront, Document, and Report

Victims of sexual harassment do not have to quietly accept harassment. Students and staff should be urged to seek emotional support from a parent, a spouse, a trusted teacher or coworker, a school counselor or psychologist, or a private counselor or psychologist. Victims of sexual harassment can take control of the situation by confronting their harassers, documenting the harassment, and reporting the problems.

### Deliberate or Unintentional?

There is a difference between a person who deliberately engages in hurtful conduct because it gives him or her a feeling of power and an insensitive person who does not realize the harm his or her behavior is causing. If the harassment is inadvertent, it can usually be stopped through a request to stop and an explanation of why the behavior is inappropriate. If the harassment is deliberate, more serious consequences will probably be needed to stop it. Discipline or the fear of discipline, serious and extensive counseling and retraining, or even termination or expulsion may be required.

### Document Every Incident

The victim of sexual harassment should document every incident in detail. Write down the who, what, where, when, and how. A victim may not know why, but she can record the rest. The victim needs to look for witnesses and other evidence from fellow students, school employees, or others who may have been nearby. Documenting the details will help establish the truthfulness of the complaint. Record the steps that were taken to attempt to dissuade the harasser. File a complaint and encourage other victims to do likewise.

## Support the Victim

When victims of sexual harassment come to a teacher or coworker for support, they should find it. Support starts by acknowledging that harassment is wrong and that it should not be endured quietly and passively. Affirm his or her feelings. Listen to the concerns without judgment and refer the victim to appropriate experts for help with the emotional and psychological harm, as well as to experts who can investigate and address the harmful conduct.

## Chapter 5-3

# Investigating Claims of Sexual Harassment

Schools should set up channels through which students can report incidents of alleged harassment and can expect a fair investigation of their allegations. Although not every complaint is automatically a true indication of intentional harassment, any allegation of sexual harassment must be treated seriously. There may be no harassment at all—simply a misunderstanding. There may be harassment based on ignorance and insensitivity rather than malicious intent. The harassment may be intentional and malicious. Or the allegation may be a false and malicious attempt to hurt the accused person. After a full and complete investigation, we can determine whether further education, punishment, or a clearing of the record is necessary.

There should be a formal process for students and staff to report possible sexual harassment. This process can, but does not have to, involve the same investigators for both student and staff complaints. It should, however, include a written complaint form. The potential victim can complete the form or let an educator complete the form with his or her responses.

There should also be an alternative procedure in case the accuser does not feel comfortable with the individuals involved in the formal procedure. This discomfort might be because the person being accused is part of the investigative team, is related to or perceived as being emotionally close

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to the accused, or because there have been previous conflicts with that person (such as student discipline).

The reporting process should also allow for reports by people who have witnessed or heard of possible sexual harassment. Teachers, administrators, and staff are under a legal and ethical obligation to report sexual harassment that they observe or have reason to believe is occurring. Students should also have a way to report behaviors they observe. Sometimes a victim's friends are willing to file a complaint even if their friend is too intimidated or embarrassed to do so personally. These reports can then be investigated and addressed.

## The Investigative Team

The members of the investigative team should be carefully selected. We recommend that investigations be a team effort, with one male and one female investigator. Potential victims, accused parties, and witnesses may sometimes feel uncomfortable talking about personal and sexual matters with a person of the opposite gender. Offering an option can increase the likelihood of more complete and open answers.

The selected investigators should not have agendas. They should not be biased for or against students or staff, perceived victims, or perceived accusers. Clearly, an opposition to sexual harassment is not a bias. All staff should be opposed to harassment. We expect investigators to be particularly opposed to harassment. We also expect that they do not have preconceived ideas about its existence or absence in a particular situation. The facts decide the accuracy or inaccuracy of the particular complaint.

*Those selected for the investigative team should have specialized training in what constitutes sexual harassment, how to interview witnesses and gather evidence, and how to use mediation and dispute-resolution techniques.*

Those selected for the investigative team should have specialized training in what constitutes sexual harassment, how to interview witnesses and gather evidence, and how to use mediation and dispute-resolution techniques. Team members also need to have the following traits: honesty, discretion, intelligence, perceptiveness, interpersonal skills, and a willingness to go where the evidence leads.

The first duty of the investigative team is to make sure that the complainant understands the process. They must interview the complainant and gather all the facts they can before they proceed. In this process, they should try to determine what remedy the accuser is seeking. The most common remedy is an end to the harassment. Seek the accuser's input on how this can be accomplished.

## Document the Process

- *Tape-record all interviews.*
- *Prepare a written report.*

## Interview the Complainant

The investigative team should consider asking the following questions when interviewing the complainant. Tape-record all interviews. (Assure the complainant the recording will remain confidential to the investigation.)

- When did the sexual harassment occur? How long ago did it start? When was the last incident?
- What did the harasser do or say? Ask the person to be as detailed as possible in his or her description and to use the exact words of the harasser. Explain that you understand how uncomfortable this can be but that the greater the detail, the easier it will be to conduct a thorough investigation.
- Where did the harassment occur? Was there anyone else who might have seen or heard the harassing conduct?
- Did you tell anyone about the harassing behavior? If so, who and when?
- Did you tell the harasser to quit bothering you? If not, why not? The solution to the situation may be as simple as telling the person to "knock it off." On the other hand, the victim may not have confronted the harasser because he or she feared retaliation or escalated harassment.
- If several weeks or months have passed since the harassment occurred or began, why did you wait so long to report the harassment? The student may have received a D on a mid-term examination in the interim and is now upset. The trauma of the situation

may have festered to the point where the student could no longer handle the stress.

## Interview the Witnesses

The investigative team should then interview fellow students, coworkers, supervisors, and members of the public who might have relevant information. Remember to tape-record all interviews, and assure the witnesses that the recording will remain confidential to the investigation. This part of the investigation does not justify questioning students who have no connection to the situation just to see what you might stir up. On the other hand, if the team has reason to believe that another student or staff member may be an independent victim of the same harasser, this evidence is highly relevant and a legitimate part of the investigation.

### Ask General to Specific Questions

Do not ask leading questions such as: "How does Mr. Smith sexually harass students?" Start with general questions about whether the person has observed anything that he or she felt was unusual or seemed improper or capable of causing discomfort. Do the students and/or staff members seem to get along? Are there any stresses or disputes between the parties? Gradually use more specific questions that focus on the particular persons involved and the alleged activities. Finally, ask very specific questions: "Did you see Mr. Smith put his hand down the back of Jane Doe's dress during Wednesday's third-period physical education class?"

## Interview the Accused

*Placing an accused employee on paid administrative leave can help ensure that the investigation is not compromised.*

The investigative team should follow the same general-to-specific questioning strategy when they interview the person who is accused. Tape-record all interviews, and assure the accused that the recording will remain confidential to the investigation. If the accused is a staff member, based on the severity of the accusations and the circumstances of your investigation, consider asking the administration to place the employee on a paid administrative leave. This is not a punishment. Rather, it is an investigative tool to help ensure that the results of the investigation are not compromised, deliberately or inadvertently. This also protects the employee from claims that he or she interfered or attempted to interfere with the investigation. Direct the employee not to discuss this matter with the accuser or potential witnesses.

## Finishing the Investigation

Gather any documentation and attempt to corroborate the factual statements. Check out the site where the harassment allegedly took place. If necessary, interview witnesses again to resolve inconsistencies or unclear statements.

**Draw Conclusions**

After weighing all of the evidence, the investigative team should draw conclusions that answer the following questions:

- Did deliberate sexual harassment occur?
- If so, was it done unwittingly and without malicious intent?
- If not, was the alleged victim sincere in his or her complaint? Or was the complaint a lie or an exaggeration intended to hurt the accused?

The team should then prepare a written report that summarizes its conclusions. Include the names of everyone who was interviewed, the substance of their statements, and all independent investigation activities, such as site visits, document review, etc. Include the conclusion and the reasons for that conclusion. If appropriate, make recommendations as to possible corrective and/or disciplinary action.

## Chapter 5-4

# Sexual Harassment Policies and Consequences

Simply stating that sexual harassment will not be tolerated is not enough. Schools should develop, communicate, and enforce sexual harassment policies and consequences. Such policies should be developed by representatives of all those involved in the school, including members of the board and the administration, the staff, the student population, and the community. If all parts of the school community help develop the policies, they will be stronger and more widely understood.

## Effective Policies

Make sure the policies are supported by the administration. Ignoring a policy is worse than having no policy at all. The policies need to be constantly reviewed in training sessions and assemblies, and they must be consistently enforced. A policy that applies to "troublesome" students but not to the top spiker on the volleyball team is legally and morally bankrupt.

The policies need to **emphasize prevention through education and training.** Punishing offenders is not as educationally satisfying as preventing the offense from occurring. Although drafting a policy and laying in wait for the offenders may boost your suspension statistics, it will not

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solve the problem. Write the policies, communicate them, and then teach students, faculty, and staff how to comply with them.

Define Procedures

The policies should clearly **define the procedures for filing, investigating, and resolving a complaint.** The procedures should be developed and implemented in a way that provides maximum protection and confidentiality to both the complainant and the accused. The policy should offer several options for reporting, including informal channels. A policy that requires the complaint to be filed with the dean of students is worse than useless when the student believes he or she is being sexually harassed by the dean of students. The policy should also require faculty and staff members to report behavior that they believe may be harassing in nature.

All complaints must be investigated promptly, sincerely, and impartially. To the maximum extent possible, the assigned investigator(s) should not have close ties with either the accuser or the accused. The investigation should include interviews of the accuser, the accused, and potential witnesses.

After the investigation is complete, take the necessary and appropriate action. The purpose of the investigation is not to convict or acquit the accused. The purpose of the investigation is to discover what actually happened, to determine the best way to resolve this situation, and to prevent future problems between these parties and within the school population in general.

## Guilt and Innocence

In investigating a claim of harassment, it is important to remember the wide variety of possibilities concerning the incident and the motivations of the parties. Each possibility calls for a different resolution.

Intentional Harassment

**Intentional harassment.** If the harassment is extremely serious and/or repetitive and intentional, the resolution may call for discipline—including possible suspension, termination, certificate revocation, or criminal charges.

### Unintentional Harassment

**Unintentional harassment.** It is important to recognize that all sexual harassment is hurtful and must be stopped. However, it is equally important to realize that not all sexual harassment is intentional. If the harassment is the result of insensitivity or lack of understanding as to the offensive nature of certain words or actions, it may call for education and training for a particular person or a group such as a team, classroom, faculty unit, or student population. If the behavior continues after the training, then it is no longer unintentional and discipline is appropriate.

### Personality Conflicts

**Personality conflicts.** If the harassment is the result of a personality conflict between two or more persons, attempting to resolve the conflict may be a necessary step to halting the behavior. Often harassers harass because they enjoy the reaction. They may harass generally or they may pick one victim whose reactions particularly please and excite them. However, sometimes the harassment is because of a real or perceived dispute, slight, or insult from the accused or someone close to him or her. Sometimes the harassment is part of an ongoing mutual verbal combat. In those instances, identifying the underlying cause of the dispute and stopping the escalating attacks and counterattacks can lead to a cease-fire, if not a peace treaty, in the hostilities.

### Misunderstandings and Cultural Issues

**Misunderstandings and cultural issues.** An investigation may also reveal that the complainant is sincere and honest, but wrong. The accuser may be hypersensitive or may have misunderstood the words or behaviors. Cultural issues may arise. Traditional American hand gestures can be deadly insults or sexual provocations in the eyes of people from other countries. Keep in mind that whether behavior is considered to be sexual harassment or not is determined by how the recipient views the behavior. If you are unsure whether an accusation is sincere, but unfounded, ask yourself: Would a typical person of the age, gender, and cultural background of the complainant find the behavior to be reasonably offensive?

It is also important to remember that even though people of the same age and gender as the complainant might not find the behavior offensive, the behavior may still be reasonably offensive. If the investigation reveals that the behavior is not reasonably offensive, but that the complainant is sincerely offended, then working with the complainant to understand the situation and to resolve his or her confusion or concerns may be the best remedy.

## False Allegations

The investigation may reveal that the complaint is both unfounded and malicious. While relatively rare, complaints of sexual harassment may be made for wrongful reasons. Such a reason might be revenge for real or perceived actions taken against the complainant or someone close to him or her. The motivation for the complaint could be a bad grade, a disciplinary referral, or a perceived insult in class. It could be to distract attention from undiscovered misconduct by the student or to try to minimize punishment for an already-discovered misconduct. The complaint might even be for fun—a form of harassment in and of itself.

Care must be taken in dealing with a person who knowingly makes a false allegation of sexual harassment. An honest mistake is relatively easy for everyone, even the accused, to handle. You document the lack of wrongdoing, support the accused and the accuser with guidance on how to heal the relationship and prevent future misunderstandings, and watch to see if the problem is resolved or needs further attention. However, a deliberate lie to get an innocent student or educator in trouble is more difficult to handle on both an emotional and a practical level.

### Exonerate the Accused

Clearly, the investigation results need to completely exonerate the person who has been wrongfully accused. The investigation report should clearly state that there was no intentional or unintentional misconduct. The investigation team should also offer support to the wrongfully accused. Educators are more likely to support and contribute to investigations if they are convinced that everyone is going to get a fair shake, and that the wrongly accused will be exonerated and protected just as the justly accused will be educated and/or punished.

If false allegations were made in an attempt to avoid punishment for misbehavior, that misbehavior needs to be handled with the same action, disciplinary or otherwise, that would have resulted if the claim of sexual harassment had never been made. There remains, however, the question of whether the student or employee should be punished for making the false allegation. The natural emotional response would be to say yes. This person intentionally lied, interfered with the effective operation of the school, wasted school resources in the resulting investigation, and made life very difficult for the person who was falsely accused.

### Do Not Punish the Accuser

Nevertheless, we recommend that the complainant not be punished for the false complaint unless there are highly unusual circumstances, such as repeated false allegations or criminal activity such as perjury or extortion. Our reasons are both legal and practical. While you must make every effort to keep the fact of the investigation and its outcome confidential, it would be naive or dishonest to say that information does not leak out on occasion. This information will almost certainly be incomplete or inaccurate. If the complainant is punished for making a claim of sexual harassment, even if the claim is completely false, the punishment will have a terribly chilling effect on persons who may consider making genuine complaints in the future. The conclusion students and staff will make is that you will get into trouble if you make a complaint.

*If the complainant is punished for making a claim of sexual harassment, the punishment will have a terribly chilling effect on persons who may consider making complaints in the future.*

This practical reason leads directly to the legal reason. Federal and state agencies exist to provide a recourse to victims of sexual harassment who believe their concerns were not adequately addressed by the school or employer. Federal agencies include the United States Department of Education, Office of Civil Rights (OCR), and the Equal Employment Opportunity Commission (EEOC). When a complaint is filed with one or more of these federal or state agencies, the agency conducts its own independent investigation of the allegations. The more complete, detailed, documented, and fair the school's investigation is, the more likely it is that these regulatory agencies will agree with the school's findings. The more reasonable and comprehensive the school's remedy to the situation, the more likely the regulatory agencies will be to find the results satisfactory—and the less likely the school or its staff are to be found judicially liable for damages.

### Retaliation Complaint

Federal and state constitutional and statutory provisions that prohibit discriminatory behaviors, such as sexual harassment, also prohibit retaliation against those who file complaints of discrimination. The reason for the legal restriction is to protect real victims of discrimination from being afraid to file a complaint because of the possibility that they will be punished or their careers may suffer. Under a retaliation complaint, a school or employer can be found guilty of retaliating against a complainant, even though the underlying complaint was unfounded or even fabricated. These legal restrictions should be explained to the person who was falsely accused.

## The Inconclusive Investigation

The worst possible situation is the inconclusive investigation. The investigators have interviewed the accuser and the accused. They have interviewed potential witnesses. They have corroborated the facts. They may even think they know the truth. However, they do not have enough evidence to justify dismissing the charge as unfounded or punishing the accused. What can be done?

### Ending the Inconclusive Investigation

1. *Make a complete report.*
2. *Make accommodations to safeguard the accuser.*
3. *Tell the accuser to report future incidents.*
4. *Monitor the situation closely.*

First, investigators should make a complete report that contains the names of all of the persons interviewed, the contents of their interviews, the other investigative steps taken, and the fact that the investigation was inconclusive.

Second, investigators should consult with the accuser to determine if he or she can continue to be in that class, activity, or work area. If the answer is yes, make reasonable and appropriate accommodations to safeguard against repeated misconduct or claims of misconduct. If the answer is no, make reasonable and appropriate changes, such as a transfer to another class, a different work study assignment, etc. If the complaint arose out of a sports or extracurricular activity, consider assigning an aide to monitor the situation—as

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opposed to transferring the coach or making the student drop out of the activity.

Third, tell the accuser that if another incident should occur, he or she should immediately report it and that the new report will initiate another investigation.

Fourth, monitor the situation closely, keeping close tabs on both the actions and the perceptions of the accuser and the accused. Use the situation as an opportunity to provide some in-service training for the accused employee. While it would be inappropriate to hold the accused employee up as the reason for a schoolwide in-service, the situation may demonstrate the need for training or retraining generally.

## Support the Victim

The final stage of any sexual harassment process is to offer continued support to the victim. If a student or staff member has been the victim of harassment, we need to help him or her heal from the situation. Offer counseling and continued support. Check in with the victim to see how he or she is doing and if there have been any reoccurrences, retaliations, or other consequences.

## Chapter 5-5

# Protecting Yourself against Allegations of Sexual Harassment

Once you understand what constitutes sexual harassment, you can take steps to avoid sexually harassing others and to protect yourself against allegations of sexual harassment. The following general suggestions and strategies can be applied in any educational facility. You may need to develop other strategies to address the environment and potential hazards in your particular school.

**Avoid behaviors that constitute sexual harassment.** Do not "hit on" students and coworkers. Do not use sexual humor or say sexually suggestive words in the presence of any student or in the presence of coworkers who might be offended. Do not use your position to exercise power and control over others. While false allegations of sexual harassment are occasionally made, these are not nearly as common as valid accusations that are never made because of a victim's reluctance. A person who does not take advantage of students and coworkers is unlikely to be the victim of a false claim.

**Treat others with respect.** You can also protect yourself against allegations of sexual harassment by treating students, fellow faculty and staff members, and parents with respect and dignity. Victims of sexual harassment often suffer from a diminished sense of self-worth. Do not engage in behaviors that might possibly demean or belittle others. Simple, consistent courtesy is an extremely effective strategy for preventing student anger and retaliation.

*The most effective weapon in a teacher's defensive arsenal is his or her good reputation.*

If you are routinely courteous and respectful of those around you, you are less likely to be falsely accused of misconduct. However, we all recognize that there may be circumstances in which a student may make a false allegation. A false accusation can be an act of revenge for a failing grade or disciplinary report. It can be a transference of hostility from an actual harasser to another person. Whatever the reason, the most effective weapon in a teacher's defensive arsenal is his or her good reputation as a teacher who does not engage in inappropriate conduct, does respect the rights of others, and does defend the actual victims of harassment. During an investigation, an educator's innocence will be easier to prove if student and adult witnesses consistently report that he or she has never done anything of a harassing nature and has never demeaned a student. On the other hand, an educator will have a far more difficult time maintaining his innocence if student and adult witnesses say, "Oh, that's just how he is. He treats all the girls that way."

Showing respect for a student does not mean you should ignore improper behavior. Indeed, it means just the opposite. If an educator truly respects students, he or she will work diligently to help them learn that they cannot profit from misconduct. Adult-imposed, external discipline is a tool we use to help students develop their own internal discipline. Showing courtesy toward a student does not mean that you do not hold the student accountable for his or her behavior. It does mean, however, that you hold the student accountable in a respectful way. There is a significant difference between saying, "Sam, that behavior is not acceptable, and I expect it to stop now" and "Sam, you always act like a stupid fool."

### Practice Fair Discipline

**Practice consistent, fair discipline.** Courteous, consistent, and fair discipline is another excellent defense against false claims. First, students are less likely to feel resentful or mistreated if they know that you treat all students the same way. Second, a teacher who is completely fair and accepts no nonsense is less likely to appear to be a good target for gambits like "If you send me to detention, I will say you touched my breast." When confronted with such a false extortion threat, your best defense is to immediately call the student's bluff. Walk the student to your immediate supervisor and make your full report, including the student's threat. A teacher who gives in to such extortion may never again control his or her classroom. A teacher who has a reputation for challenging such attempts will be a very unattractive target for false allegations.

### Avoid Physical Contact

**Avoid physical contact with students.** Physical contact between educators and students is a subject of great controversy. We all recognize the importance of touching as a means of expressing affection, and we understand the need, particularly among small children, for human contact as a prerequisite for healthy growth. We also recognize what constitutes a "bad touch" and how physical contact can lead to misunderstandings and the appearance of impropriety. We know how predators will ease from "good touch" into "bad touch" as a part of their stalking behavior.

In a perfect world, all physical contact between educators and students would be good, healthy, rewarding, and perceived as such. We do not live in a perfect world. In a purely legalistic world, there would never be any physical contact of any nature between educators and students or between coworkers. We do not live in a purely legalistic world. What, then, are the safest techniques to blend these two worlds?

We must recognize the age demarcation. Touching that may be appropriate between a kindergarten teacher and a five-year-old is totally inappropriate between a high school teacher and a 17-year-old student. As a general rule, physical contact between educators and students should come to an almost complete halt by the end of the fifth grade, if not earlier.

*As a general rule, physical contact between educators and students should come to an almost complete halt by the end of the fifth grade, if not earlier.*

When dealing with adolescents, a brief professional handshake is better than a hug—and verbal praise is even better yet. Avoid lingering handshakes and do not hold onto or restrict the student's movement. Do not initiate hugs

*If a student spontaneously hugs you, turn to the side so that the hug is side to side or student front to your side.*

with adolescents. If a student spontaneously hugs you, you are not required to recoil with horror. At any age, if a hug does occur, turn to the side so that the hug is side to side or student front to your side. Avoid a front-to-front hug with a student. In the classroom, at any age, never touch a student on the legs or body trunk. We recommend that you do not even touch junior high and high school students on the arms or shoulders when seeking their attention or giving personal instructions at their desks. Instead, use verbal prompts and point. To the maximum extent possible, demonstrate without touching during coaching, physical education, or recess exercises. If you absolutely have to touch a student to demonstrate the proper stance, hold, etc., do it with minimum contact and maximum formality. Never set students on your lap.

### Compliment Achievements

**Compliment students on achievement, not appearance.** Offering a personal compliment can cause serious problems for an educator, even when the intent of the compliment is purely innocent. Nevertheless, teacher-to-student compliments are natural and desirable—in fact, the absence of compliments is a virtual guarantee of teacher failure. Students respond to praise. Genuine praise can lead to further student success. The problem is not whether educators should compliment their students and their coworkers, but what can be praised and how compliments should be given.

Some compliments that may be appropriate between a wife and husband or a dating couple are never appropriate in a school or business setting. There is never a time when it is appropriate for a teacher to tell a student that he or she looks sexy, hot, or desirable. There is never an appropriate time for an educator to tell a student what a great figure she has or how handsome he is. Do not comment on how attractive a student's outfit is or on how pleasant a student's perfume or cologne smells.

As educators, our job is not to tell students they are attractive. Our job is to let them know that we recognize their hard work, that we know they are trying, or that their last report, project, or art piece was well done. Compliment students on their achievements, successes, sincere attempts, cooperation, and good attitude. Go out of your way to find them doing something good in one of these areas and then praise them. Just keep the compliments focused on their efforts and achievements—not on their looks.

# Case Studies

## Discussing Sex, Politics, and Religion

**May I talk to my students about sex, politics, and religion?**

In a classroom setting, within the confines of an approved curriculum, teaching techniques can be used to examine selected issues in these areas in a way that neither advocates nor exploits the issues. These techniques include lectures and class discussions. Outside of a curricular setting, we generally recommend against faculty and staff discussions on these topics with or in the presence of students.

Few topics of discussion among adults are as pervasive, controversial, entertaining, and disruptive as sex, politics, and religion. These topics become more controversial and disruptive when they occur in the school setting, and they become positively hazardous when they involve student and staff interactions.

It is axiomatic that class time should be spent on the class topic and should be in line with the accepted curriculum and course of study. Understandably, on occasion, there will be student/faculty small talk about upcoming school events, school holidays, or classroom entertainment, such as a popcorn party given as a reward for completion of a complex three-week unit of study.

With this in mind, discussions of sex, politics, or religion will almost always be inappropriate in certain classes—mathematics, for example. No matter how discrete, scholarly, neutral, and intellectually challenging the discussions on these topics may be, they have nothing to do with how to compute square roots or figure percentages—the topics the students should be learning.

In other classes, discussions of sex, politics, or religion are directly curricular. For example, it would be impossible to conduct a sex education class without discussing sexual issues. Similarly, a course on current events would be inadequate if political issues could not be discussed.

### In-Class Discussion

We recommend following the guidelines provided below when considering whether in-class discussion of sex, politics, or religion would be appropriate:

**The discussion must legitimately relate to the class subject.** A discussion on the religious issues affecting immigration from Europe to the Americas is an essential part of the study of the pilgrims in a history class. A discussion of contemporary politics and its effect on fiscal policies could be very relevant in an economics class. A discussion of general reproductive issues could be relevant in a biology class. Religion has a significant, understandable, and undeniable impact on philosophy, art, and music.

**The discussion must fit in the course of study where it occurs.** A discussion of new age philosophies or a discussion of the beliefs of Christianity or Buddhism would be inappropriate in a unit on New Deal politics.

**Discussions must be nonpartisan.** It is completely inappropriate for a teacher to use his or her position to advocate personal beliefs to a captive student audience. Such conduct also outrages parents and carries severe job consequences. Within the classroom, we do not advocate democratic, republican, communist, socialist, or any other political positions. We do not advocate Islam, Christianity, Buddhism, Wicca, or atheism. We do not advocate orthodox, conservative, or reform, nor do we advocate Catholicism, Methodism, Pentecostal, or other denominational beliefs.

In government or history classes, it is appropriate to discuss the differences and similarities between different political parties. It is not appropriate to express preference for or belief in the superiority of one political party.

In a world religions class, it is appropriate to explain the beliefs and tenets of common world religions, including reading selections from the holy writings of these faiths. It is not appropriate to focus on a single religion, spend an inordinate amount of class time on a single religion, or advocate the correctness or superiority of one religion or no religion.

In an art history class, a discussion of Middle Ages art or Islamic architecture would be incomplete if it did not discuss religious influences. An examination of these influences in a neutral and objective fashion is appropriate and necessary. An examination of Gregorian chants or Native American music would also be incomplete without an objective and neutral examination of religious influences.

**Discussions must be age-appropriate.** This is particularly important when considering sex education classes. A graduate-level course in human sexuality for marriage counselors might include a listing of graphic and even crude sexual terms to help participants overcome any shock and embarrassment the words may elicit when their clients use them. This type of detail would be completely inappropriate in an undergraduate college psychology, human sexuality, or even deviate sexuality course. This type of detail would likely be grounds for terminating the employment and revoking the teaching certificate of an elementary teacher or even a high school teacher who is conducting a sex education course.

A teacher's language and discussion topics need to be age-appropriate, respect the sensitivities of students and their parents, and be in strict accord with the approved curriculum. Keep the language, instructional level, and topics appropriate to the student's level of understanding.

**Plan ahead.** Classroom activities, discussions, and topics need to be curriculum-driven. We strongly recommend that any curriculum that includes sexual, religious, or political matters be developed and/or reviewed by either a faculty committee or the administration. This offers a degree of protection to the classroom teacher if the instruction becomes controversial. In addition, detailed lesson plans are a vital self-limiting tool for covering controversial subjects. The more complete the planning for subjects that have sexual, political, or religious elements, the less likely the teacher is to digress into inappropriate territory.

**Stay out of local politics in the classroom, particularly school politics.** The classroom is not an appropriate setting to discuss the upcoming school board meeting, bond issue, or override election. Using the classroom to advocate a particular result in such elections may violate school policies and state statutes.

**Keep your personal life out of the classroom,** including discussions of matters of school policy that may affect you personally. Never discuss grievances in which you are participating or disciplinary matters that involve you or other staff members. Do not involve the students in classroom discussions of the fairness or unfairness of school policies regarding staff behavior, such as a new schedule that requires teachers to arrive at school 30 minutes earlier.

In an ideal world, your students should not be able to determine your political party or religious faith or denomination from your classroom activities. There is never a reason to discuss your personal sexual practices in any class, including sex education.

## Discussion Outside of Class

We strongly recommend that you **never discuss sex, politics, or religion with a student outside of the classroom or other organized, planned, and relevant activity.** As an adult authority figure, it is never appropriate for you to use the school setting, or your access to students, to proselytize them to your personal beliefs. You should also avoid discussions on these topics with fellow staff members when you are in the presence of students.

This admonition does not apply only to interactions on school grounds or during school hours. Obviously, it is *never* appropriate for a school employee to discuss sexual matters with a student in a non-school setting. It is *never* appropriate to discuss personal sexual matters with a student in any setting. This includes your home, the student's home, the movie theater, the grocery store, or any other place.

We also recommend that you do not discuss politics or religion with your students in a non-school setting. There are some very limited exceptions to this guideline. If you and one of your students attend the same church, it is not inappropriate for you to be the student's Sunday school teacher or to teach religious classes in which the student may participate. You should, however, make sure that you keep the two roles separate and do not talk about public school matters, if possible, in church school. Never talk about church school matters in public school.

Similarly, if you are involved in the activities of a political party and the student, through his or her parents or as a teenage volunteer, is also involved in the same political party and activities, it is not inappropriate to interact with the student during these activities. Again, keep a strict separation between your school activities and role and your non-school, volunteer political activities. Do not use school time, school facilities, or school influence as a springboard to inviting a student to attend your church, come to your Sunday school or church choir meetings, or join your political party or come to political activities. Do not show favoritism to a student who attends your church, whose parents belong to your political party, or who participates in the same out-of-school activities that you do.

**Avoid even the appearance of a conflict of interest if you have a part-time paid or volunteer position outside of school.** For example, a school employee may volunteer as a member of a suicide hotline or work part-time for a social welfare agency. If time and resources permit, have someone else handle professional matters involving your students. On the other hand, do not be rule-bound to the extent of harming the child. If one of your students calls a suicide hotline on which you volunteer, do not hang up on the child or tell them you cannot or will not talk to them. Find the child the assistance he or she needs and then extricate yourself as gracefully as possible from the situation. After the crisis is resolved, let the appropriate mental health authorities and your administrator know about the incident and the relationship so that they are aware of the dynamics of the situation.

**Avoid business or financial interactions with your students and their families.** This extends beyond our warning to not tutor your own students for money. If you are involved in a home sales or a multilevel marketing business, do not approach your students or their families. Seek your customers elsewhere. If you sell life insurance or real estate on the side, do not seek out or handle your students' families' insurance or real estate needs. However, if you work part-time in a local department store, it is not a conflict to wait on your students or their families. In addition, if you work during the summer as an electrician, and your employer sends you to a service call at a student's home, it is not a conflict to perform the electrical services.

In general, you can avoid problems by following this simple rule concerning the discussion of sex, politics, and religion between educators and students: Do not tell them about yours, and do not ask them about theirs.

## Suing for Slander or Libel

**Parents have falsely accused me of serious criminal or unprofessional misconduct. Can I successfully sue them for defamation (i.e., libel or slander)?**

Probably not.

Suing for defamation is a legal course of action that arises when one person makes a false statement to a second person, which reasonably hurts the reputation, economic position, or other aspects of a third person's life. The subject of the statement may then sue the person who made it for defamation based on the libel or slander that caused real and actual harm.

Libel is written defamation. This includes radio and television broadcasts and material posted on the Internet. Slander is oral defamation. No matter how false and hurtful a statement may be, it is not defamation if it is made only to you. It may have been made to inflict mental distress, but it is not defamation. For a statement to be defamatory, it must be communicated to at least one person other than the person making the statement and the person the statement concerns.

The statement must also be false. In the United States, truth is an absolute defense. If an educator was convicted of a criminal offense when he or she was 18 years old, then it would not be defamation for someone to publicize this conviction 40 years later when the educator was being considered for a superintendency, professorship, or national award.

Defamation is not a favored course of action, and legislatures and courts have crafted a number of defenses or exceptions to defamation actions. **Our society places a premium on free speech and is reluctant to encourage actions that may limit that free speech,** particularly when reported by the news media. Thus, if a person is a public figure, he or she cannot succeed in a defamation suit unless it can be established that not only was the statement false, but the person or entity making the statement also knew it was false or acted in reckless disregard of the truth. Simply being wrong is not enough. Even being negligently wrong is not sufficient. In many states, public employees such as teachers are considered to be public figures. A defamation suit brought by a teacher to court in one of these states would be held to these higher standards of proof.

Furthermore, if a person can be successfully sued or otherwise punished for making a false claim, then people with valid claims could be intimidated from making reasonable and accurate complaints. Thus, a complaint to a police department that results in an extensive, expensive, and emotionally draining investigation of a teacher will seldom, if ever, result in damages being awarded to the individual who was falsely accused. In the same way, a complaint of unprofessional conduct to the school administration, the state certification authorities, the Office of Civil Rights, or the state department of health services—no matter how false and no matter how painful and time-intensive it may have been for the teacher—is unlikely to result in a successful defamation suit.

**Suing for defamation is one of the most expensive and least productive courses of legal action.** The cases are normally very complex, both legally and factually. Some attorneys will take such cases on a contingent-fee basis (not receiving legal fees unless the plaintiff collects funds from either a settlement or judgment). Most attorneys, however, will take such cases only if they are paid for each and every hour they work because of the time expenditures and probable lack of recovery. With legal fees ranging from $100 to $250 an hour, it takes very few hours for the legal fees to exceed any possible recovery. Even if the attorney accepts the case on a contingent-fee basis, the plaintiff is responsible for the cost of the litigation, such as court costs, expert witness fees, deposition fees, etc. These costs can run into thousands of dollars, and it is generally a violation of legal ethics for the attorney to waive these fees.

Even in the unlikely event that you win a defamation suit, recovery is typically limited to the actual economic cost to the individual, with only occasional rewards for pain and suffering. Thus, if someone makes a false and malicious accusation against a teacher and if no one believes the accusation and it does not cost the teacher his or her job or money to defend against the accusation, there is little possibility of a high monetary recovery from a defamation suit covering the accusation. **Spending $10,000 or $20,000 in attorney's fees to collect considerably fewer dollars in nominal damages is not a wise economic decision**. In addition, litigation would probably spread the defamatory statements far wider than the original communication. Recently, a fast-food chain spent millions of dollars during a defamation suit to collect less than $200,000. In the process, the litigation gave worldwide publicity to a group that had been doing local picketing. The fast-food chain may have won the suit, but did it really win?

Finally, a judgment does not equal actual money in the bank. A person can file a lawsuit, prevail on every factual and legal issue, and receive a judgment for $10 million against the person who defamed her. At this point, the plaintiff has spent time and effort, possibly over a period of years, and has spent a considerable amount of money to achieve the judgment in his or her favor.

Nevertheless, the judgment has no meaning if the defendant does not have the resources to pay it. When there is no money to collect, the judgment is worthless. Even if the defendant has some assets, federal bankruptcy and state statues such as homestead statutes often make many of these assets exempt from seizure. The judgment may not even serve as an economic collar around the neck of the defendant, since bankruptcy laws will usually give the individual a way to permanently escape the debt.

In conclusion, there is not always a remedy for every wrong that is done to us.

# PART 6

# Racial, Ethnic, and Religious Harassment

Chapter 6-1 What Is Racial, Ethnic, and Religious Harassment?

6-2 Strategies for Addressing Racial, Ethnic, and Religious Harassment

6-3 Free Speech and Harassment

6-4 Protecting Yourself against Claims of Racial, Ethnic, or Religious Harassment

## Chapter 6-1

# What Is Racial, Ethnic, and Religious Harassment?

People have a dismaying tendency to divide into groups based on one or more characteristics and to fear, hate, and mistreat anyone who does not share those characteristics. These characteristics may include racial and ethnic backgrounds and/or religious preference. Racial hatred and bias are common limitations of the human race, but even people who live in racially homogeneous areas and nations find ways to divide and abuse each other. In the former Yugoslavia, Serbs, Croatians, and Muslims murdered and raped each other during a civil war based on ethnic and religious differences. In Rwanda, Hutu and Tutsi citizens committed atrocities against each other based on tribal membership. Militant groups in Ireland—one of the most homogeneous countries in the world—injure and kill members of the other group and civilians based on their religious preferences.

Although we wish that all people based their public and private behavior towards others on who those people were as individuals, rather than on the characteristics they may share with a group of people, unfortunately, this is not the case. As a result, state and federal laws try to enforce that which should come naturally. These laws extend into the school environment, where acts of bias,

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ignorance, fear, disruption, and violence arise from artificial divisions in the human race.

Many students come to school with some bias, prejudice, and hatred already instilled through their interactions with family and society. These students may deliberately harass, humiliate, anger, or provoke other students based on their color, ethnic origin, or religion. In other cases, the behavior may not be intended to harass, anger, or provoke, but it can have that effect even if it stems from insensitivity, thoughtlessness, or lack of emotional control.

Sadly, schools are considered prime recruiting grounds by racial extremists. Hate groups will recruit at the schools and will attempt to provoke racial incidents to further their own ends.

## Legislation

A number of federal laws and the United States Constitution prohibit discriminating against a person because of his or her race, national origin, ethnic background, creed, religion, age, disabling condition, or gender. Title VI of the Civil Rights Act of 1964 states in part that no person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal funds. The Americans with Disabilities Act, Section 504 of the Rehabilitation Act, and the Individuals with Disabilities Education Act all prohibit discrimination based on a disabling condition. Section 504 provides that no otherwise qualified individual with a disability in the United States shall, solely by reason of that disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal funds.

## The Constitution

Under the Fourteenth Amendment to the United States Constitution, these restrictions and prohibitions are made binding on each state and on its political subdivisions and creations, including its public schools. Schools are prohibited from discriminating against their students and staff based upon illegally discriminatory categories. In addition, they are legally required to work to create an educational environment in which students and staff are not burdened by the discriminatory actions of other students and staff.

Just as schools have responsibilities to prohibit sexual harassment, they have responsibilities to prohibit harassment based on race, ethnic background, and religious preference. Incidents of racial, ethnic, and religious harassment are not exhibitions of pride or solidarity, or a celebration of culture and history. Incidents of racial, ethnic, and religious harassment violate the law and disrupt the educational process.

*Schools are legally required to work to create an educational environment in which students and staff are not burdened by the discriminatory actions of other students and staff.*

Racial, ethnic, and religious discrimination harms our students. Like sexual harassment, racial harassment causes serious and pervasive harm to those who engage in and who are victimized by the behaviors. The courts have recognized the harm such discrimination and harassment can cause. In *Hawkins v. Coleman,* a federal district court noted that unequal treatment of black students led to the students suffering from depression, frustration, increased passivity, increased hostility toward the school, tardiness, cutting classes, and other misconduct. Legal commentators have noted the long-term psychological harm caused by hate messages and the resulting stigmatization (Milani, 1995).

Our society engages in a pervasive form of *de facto* separation of races, ethnic groups, and religious preference. In contrast, the education system and the military—more than any other organizations in our culture—bring together people of diverse backgrounds and make them work and function together. This forced contact is our greatest hope in avoiding the Balkanization of American society. It is easy to hate or fear that which you do not know. Hatred thrives on isolation and negative reinforcement. It is much more difficult to hate a class of people when you have played happily together on the playground or a sports team. It is much more difficult to resent others if you worked together as students to complete a report.

As educators, we have the serious and significant responsibility of helping our students recognize that their classmates' merit and worth are based on their humor, good nature, intellect, and skills rather than on their race, ethnic background, or religious preference.

## Chapter 6-2

# Strategies for Addressing Racial, Ethnic, and Religious Harassment

The courts have consistently used similar analysis and interpretations when dealing with sexual harassment, racial harassment, and discrimination based on a person's disability. All of the strategies mentioned in Chapter 5-2, Strategies for Addressing Sexual Harassment, are equally helpful in creating a school environment that confronts and seeks to eliminate racial, ethnic, and religious harassment. Those strategies include teaching the teacher; being vigilant; modeling tolerance; teaching the students; confronting, documenting, and reporting harassment; and supporting the victim. There are additional strategies that your school can use to confront racial, ethnic, and religious harassment. These strategies will also help you address the problem of sexual harassment.

## Develop, Communicate, and Enforce a Clear Policy against Harassment

First, schools need a clearly written, widely communicated, and consistently enforced policy that prohibits discrimination or harassment based on the race, creed, color, religion, or national origin of the student.

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## Adopt a Zero-Tolerance Attitude

**Office of Civil Rights**

The Office of Civil Rights of the United States Department of Education investigates allegations of racial discrimination and harassment. The office particularly emphasizes the investigation of two types of discrimination:

1. Is the individual being treated differently because of his or her race, ethnic origin, or religion?
2. Is there a hostile environment based on or caused by racial, ethnic origin, or religious discrimination?

Your school may be scrupulously neutral and fair in its own treatment of the students, ensuring that no student is disciplined differently, has different extracurricular opportunities, or receives a different educational program because of race or ethnic origin. However, if it allows an environment in which students harass other students based on their religion or race, the school will be in violation of federal laws. The Office of Civil Rights has written:

**Title VI Violations**

> *A violation of Title VI may . . . be found if a recipient [of federal funds] has created or is responsible for a racially hostile environment—i.e., harassing conduct (e.g., physical, verbal, graphic, or written) that is sufficiently severe, pervasive or persistent so as to interfere with or limit the ability of an individual to participate in or benefit from the services, activities or privileges provided by a recipient.*
>
> *Under this analysis, an alleged harasser need not be an agent or employee of the recipient, because this theory of liability under Title VI is premised on a recipient's general duty to provide a non-discriminatory educational environment. (59* Federal Register, *p. 11448)*

**Hostile Academic Environment**

In this same document, the Office of Civil Rights explains the determinations that the office must make in order to establish the existence of a hostile academic environment. The office must determine that:

1. A racially hostile environment existed;

2. The recipient had actual or constructive notice of the racially hostile environment; and
3. The recipient failed to respond adequately to redress the racially hostile environment (p. 11448).

An article in the *Akron Law Review* explains the practical elements that are considered in an analysis to determine whether a racially hostile environment exists:

> *In determining whether the harassment is severe, pervasive or persistent, OCR will examine the context, nature, scope, frequency, duration, and location of racial incidents, as well as the identity, number, and relationships of the persons involved. In most cases, the harassment must consist of more than a casual or isolated incident. However, a racially hostile environment requiring appropriate responsive action by a school may result from a single incident that is sufficiently severe. Racial acts need not be targeted at the complainant in order to create a racially hostile environment. Also, the harassment need not be based on the victim's or complainant's race so long as it is racially motivated. For example, it might be based on the race of a friend or associate of the victim. (Milani, 1995)*

A school and its staff cannot defend itself against a complaint of a racially hostile environment by ignoring the situation and then claiming they had no notice. If a reasonably diligent inquiry, made with reasonable care, would have provided information on the situation, then the school and staff had constructive knowledge and are as guilty as if they were watching every action and doing nothing. In other words, if the school should have known to make an inquiry, and a reasonable inquiry would have revealed the problem, the school is responsible. The school and its staff can also be held responsible for allowing a racially hostile environment if it knew or should have known of some, if not all, of the incidents that created the hostile environment and led to the complaint.

*If the school should have known to make an inquiry, and a reasonable inquiry would have revealed the problem, the school is responsible.*

*A school that does not have a clear, well-communicated, and consistently enforced policy against racial, ethnic, and religious harassment will not be able to prevent the harassment.*

As a practical matter, a school that does not have a clear, well-communicated, and consistently enforced policy against racial, ethnic, and religious harassment will not be able to prevent the harassment. As a legal matter, such a school will not be able to convince the Office of Civil Rights or the courts that it has responded or even intended to respond adequately to prevent or redress a racially hostile educational environment.

When aware of a hostile academic environment, the school must take reasonable steps to eliminate that environment. The reasonableness of the steps will be measured by:

- whether the school has appropriate disciplinary policies, grievance procedures, and anti-harassment/discrimination policies;
- whether these have been distributed and communicated to the students;
- whether they are consistently used and enforced; and
- whether, upon discovering a problem, the school has been proactive with programs such as racial, ethnic, religious, and/or gender awareness training.

### Counseling Programs

The Office of Civil Rights also considers whether schools have programs that provide counseling for both the victims of harassment and those who perform the harassment.

There are some minor differences between sexual harassment and harassment based on race, ethnic origin, or religious preference. In an investigation of a sexual harassment claim, the school must determine that the behaviors of a sexual nature were unwanted. There is no sexual harassment, for example, when a couple wants to hold hands and does so. There is sexual harassment, however, when a boyfriend insists on holding his girlfriend's hand even though she does not want him to. There is no such requirement in investigating claims of racial, ethnic origin, or religious harassment: "Racial slurs are intrinsically offensive and preemptively unwelcome" (Roth, 1994).

In addition, racial, ethnic origin, and religious harassment does not have a *quid pro quo* component. Sexual harassment can often have a something-for-somthing element: "If you have sex with me, you will get an A." This does not exist in the other forms of harassment, which create a hostile academic or work environment. That environment may be made even more hostile and even dangerous by verbal assaults or insults, graphic and insulting cartoons or photographs, or actual physical assault.

## Present a Unified Front

Obviously, one of the best strategies for preventing all types of harassment is a clear opposition to it by all faculty and staff members. A unified front will help create a school environment in which racial, ethnic origin, religious, or sexual harassment is not condoned by the staff and less likely to cause a student disturbance. In contrast, students who feel that the faculty and administration are ambivalent or even hostile toward their race, ethnic group, or religious preferences are more likely to respond violently to slights, insults, or provocation based on these characteristics.

## Chapter

## 6-3

# Free Speech and Harassment

Speech is a common element of most harassment based on race, ethnic origin, and religious preference. Such harassment commonly involves spoken racial epithets and slurs, written insults that are degrading and outlandish, derogatory drawings, etc. Those engaged in such expression may cite their constitutional right to free speech and expression. At what point does freedom of speech become illegal harassment?

Two of the founding tenets of our nation are that all people are created equal and that people have a right to freedom of expression, even when others may disagree with it. How do we balance these competing concepts? As public institutions, schools are bound to honor the constitutional rights of its students. In a case involving the rights of students to protest the Vietnam War in a nonviolent, nondisruptive manner, the United States Supreme Court stated that students do not "shed their constitutional rights to freedom of speech or expression at the school house gate" (*Tinker v. Des Moines Independent Community School District*, 1969). Students do not, however, have a limitless right to free speech and expression.

## Limiting Free Speech in School

While students do not lose their rights to freedom of speech while at school, the Supreme Court explained that

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freedom of speech was not without limits in the school environment:

> *[C]onduct by the student, in class or out of it, which for any reason—whether it stems from time, place or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is . . . not immunized by the constitutional guarantee of freedom of speech.* (Tinker v. Des Moines Independent Community School District, *1969*).

### Right to Control Student Speech

As agents of elementary and high schools, educators have a much greater right to control the time, place, and manner of student speech than any other organization in society. Colleges and universities have much greater limitations on their ability to regulate student speech. By contrast, elementary and high schools have great latitude to regulate student speech as long as they can demonstrate that, unregulated, the "speech" would disrupt educational activities. For example, *Bethel School District No. 403 v. Fraser* (1986) addressed the use of lewd speech during a school assembly. In considering the case, the Supreme Court noted that the role and purpose of public schools is to "prepare pupils for citizenship in the Republic. . . . It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation."

The court went on to explain:

> *Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse. Indeed, the "fundamental values necessary to the maintenance of a democratic political system" disfavor the use of terms of debate highly offensive or highly threatening to others. Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. The inculcation of these values is truly the "work of the schools." The determination of what manner of speech in the classroom or in school*

*The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.*
—Bethel School District No. 403 v. Fraser *(1986)*

> *assembly is inappropriate properly rests with the school board.* (Bethel School District No. 403 v. Fraser, *1986*)

Clearly, racial, ethnic, and religious slurs, taunts, insults, and challenges are an even greater threat to the safety of students, the maintenance of school order, and the protection of the psychological health of the students than sexual innuendoes in a high school assembly. The need to regulate hate speech is vital to the function of the school.

## The Public Forum Doctrine

Another doctrine used by the Supreme Court to authorize school regulation of student speech is the public forum doctrine. In our society, no speech is as protected as public forum speech, which is the right of a disgruntled citizen to stand on a soapbox in a park and rail against the government or society. This is truly free speech incarnate. However, a school is not a public park. It is an institution with responsibilities and tasks that cannot be freely disrupted. This difference was recognized by the Supreme Court in *Hazelwood School District v. Kuhlmeier* (1988), which stated:

*A school is not a public park. It is an institution with responsibilities and tasks that cannot be freely disrupted.*

> *The public schools do not possess all the attributes of streets, parks, and other traditional public forums that "time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." Hence, school facilities may be deemed to be public forums only if school officials have "by policy or by practice" opened those facilities "for indiscriminate use by the general public" or by some segment of the public, such as student organizations.*

**Control over School-Sponsored Speech**

Thus, schools can exercise control over school-sponsored speech, such as newspapers, yearbooks, assemblies, plays, concerts, etc., and may prohibit words or expressions in these school-sponsored activities that are harassing or discriminatory in nature.

## The Doctrine of "Fighting Words"

*A person does not have a right to falsely cry "Fire!" in a crowded theater.*

The courts have also long recognized the right of society in general—not just public schools—to regulate speech that constitutes "fighting words." The freedom of speech is not unlimited. A person does not have a right to falsely cry "Fire!" in a crowded theater. Some speech has little or no societal value and has serious societal harm connected with it. While not without limit, the doctrine of fighting words was explained by the Supreme Court in *Chaplinsky v. New Hampshire* (1942):

> *[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include . . . the insulting or "fighting" words—those which by their very utterance inflict injury or intend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.*

The restriction on fighting words is that they must "have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed" (*Gooding v. Wilson,* 1972). Within the context of the public schools, certain racially, ethnically, and religiously charged insults are likely to have a direct tendency to cause acts of violence by the person to whom they are addressed. The very use of such words must be prohibited and punished when they occur.

### Time, Place, and Manner Restrictions

Some of the lower-court decisions have used the *Tinker* time, place, and manner restriction to prohibit certain expressive symbols, school songs, and team names that have a racially charged history and that could have a potentially disruptive presence in an educational setting. Some of the restricted expressions include "Dixie" as a school song, the

Confederate battle flag as a school symbol, the nickname "Rebels," and the wearing of clothing bearing Confederate symbols (See *Augustus v. School Board,* 1975, and *Melton v. Young,* 1972).

**Three Approaches to Handling Free Speech Rights**

The District Court for Massachusetts rendered an opinion in a case concerning a T-shirt that stated "Coed Naked Band: Do It to the Rhythm." This opinion consolidated the issues on which schools could restrict student expression:

> *These cases reveal at least three approaches to the First Amendment rights of high school students. First, "vulgar" or plainly offensive speech (Fraser-type speech) may be prohibited without a showing of the disruption or substantial interference with the school's work. Second, school-sponsored speech (Hazelwood-type speech) may be restricted when the limitation is reasonably related to legitimate educational concerns. Third, speech that is neither vulgar nor school sponsored (Tinker-type speech) may only be prohibited if it causes a substantial and material disruption of the school's operation. (*Pyle v. South Hadley School Committee, *1984)*

## Develop Specific Policies

School policies concerning prohibited hate speech or fighting words need to be drawn specifically enough to ensure that they will not be overturned as vague or overbroad. Although such policies cannot require pleasantness and courtesy, they can prohibit words and expressions that are likely to lead to violence or disrupt the educational setting. Nevertheless, these policies should not be drawn so narrowly that they become subject to challenge as restricting a particular form of speech. They need to restrict speech that could disrupt the educational setting, not speech that the school's board, administration, faculty, or even students find disagreeable. The restrictions must be time, place, and manner restrictions—not content restrictions—and must apply to all students.

## Chapter
## 6-4

# Protecting Yourself against Claims of Racial, Ethnic, or Religious Harassment

The best way to avoid a claim that you have engaged in racial, ethnic, or religious harassment is not to engage in that type of behavior. There is obviously no better defense to a claim of improper conduct than innocence. A teacher who always treats the students as individuals, with individual strengths, weaknesses, and personality traits is much better prepared to avoid claims of bias or harassment. You can also protect yourself against claims of racial, ethnic, or religious harassment by using the following strategies.

## Respect Students and Treat Them Fairly

Teachers who treat students with respect and dignity are more likely to be respected in return. Teachers who practice fair and consistent discipline may be resented as a "hard case," but will be acknowledged as someone who does not show bias.

## Think before You Speak

We tell our students to "engage the brain before opening the mouth." This is good advice for us as well. Sometimes a thoughtless word or phrase or an insensitive

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comment can damage or even destroy years of respected conduct. Avoid making jokes, comments, or statements that use any type of racial, ethnic, or religious stereotypes. Do not make any student the butt of a joke. Such singling out can create resentment and lead the student to assume that you made the comment because of the student's race or other characteristic.

## Gain Your Students' Trust

Let them know that you will say what you believe and that you will follow up on your promises. This can be of vital importance in a racially or ethnically charged situation, especially one in which troublemakers are trying to increase tensions and disrupt the school environment. If a confrontation appears to have its roots in racial, ethnic, or religious animosity, or if a disagreement has degenerated into a confrontation involving such animosity, separate the combatants from the rest of the student body so that the poison does not spread.

## Squelch Rumors with Plain Talk

Rumors are a time-honored technique for causing racial, ethnic, or religious unrest and violence. For a racial supremacist, there is no better recruitment technique than rumors to create distrust among students of different races and foster violence of one group against another, setting a cycle of revenge and retaliation in motion. Rumors thrive when people are anxious, situations are uncertain, and language is ambiguous. The last thing rumormongers want is a faculty member who confronts the situation head-on with calm honesty.

Rumors require either false information or partial information to do their worst work. Our best defense against these rumors is a calm reciting of the facts and an explanation of what the school plans to do about the situation. If rumors are being spread, and these are affecting the racial, ethnic, and/or religious harmony of the school, confront them. If serious enough, rumors can be addressed in a student assembly in which the true facts are presented and the school's position is reiterated. Rumors can also be discussed frankly and become an excellent case study for a social studies, political science, ethics, or problem-solving class. Author Peter Blauvelt (1981) notes that "in openly analyzing the rumor, instead of blindly reacting to it, you and your students will be applying the most powerful tool you have as an educator—reason and rational, disciplined analysis."

Above all else, condemn the hate, prejudice, and violence that are contained in and fostered by rumors, hate literature, and hate speech. If hate literature is brought onto campus or hate graffiti shows up in your school, get rid of it as quickly and as quietly as possible. Hate slogans painted on a school wall need to be covered immediately. Do not wait until the job can be done perfectly. Deny the perpetrator the joy of seeing his or her work and protect the students from the ugly message.

*Above all else, condemn the hate, prejudice, and violence that are contained in and fostered by rumors, hate literature, and hate speech.*

## Act as an Ambassador of Peace

If two groups are rivals based on race, ethnic origin, religion, or any other basis, use some of the techniques that work in dealing with gangs. Try to get the two groups to talk with each other, appreciate their differences, and negotiate a truce. Such efforts will help students get to know each other as individuals and stop hating each other as members of a group. If a particular location on campus is the site of disturbances of a racial or ethnic nature, close the site or monitor it closely. If certain people create or foster disturbances of a racial or ethnic nature, become their shadows. You may not change their attitudes, but they will realize that you are aware of the situation, and they will be more likely to take their troubles off campus.

## Use Student Leaders Wisely

Train and empower student leaders from throughout the student body. If a confrontation between students of two different ethnic groups is simmering, trained student facilitators who represent an ethnic diversity can be useful. Such student intervention, however, must be used wisely.

Do not put your student facilitators into an actively dangerous situation or one where they do not have proper adult supervision and backup.

## Provide Positive Alternatives

*There is no better cure for the illness of racism than making a friend from the group you once hated or feared.*

Give students extracurricular and curricular activities that allow them to meet, mix, and get to know one another. There is no better cure for the illness of racism than making a friend from the group you once hated or feared. Foster in your students a sense of school identity that will take greater importance than the isolation of a purely racial or ethnic identity.

# PART 7

# Gang Activity

Chapter 7-1 Understanding Gangs

7-2 Opposing Gang Activity

7-3 Controlling Gang Activity through Appearance

Case Study Handling Contraband

## Chapter 7-1

# Understanding Gangs

Gangs are organizations of three or more members that can include juveniles or adults, students or nonstudents, or any combination. A gang can include only three or over 3,000 members spread out in different cities and even different states. In the past, gangs have been almost exclusively male—with female associates or hangers-on—but the number of female gangs is increasing. Female gangs may or may not be associated with male gangs. Many gangs are formed along ethnic and/or racial lines.

## Why Are Gangs Attracted to Schools?

Schools used to be largely neutral territory. Now they are perceived as relatively safe gathering and meeting places for gang members. Schools also represent a tremendous pool of potential recruits and an open market in which to present and sell the gang's merchandise to a large customer base. In addition, gang members feel important and powerful in most schools because there are many people in the schools who are frightened by and uncomfortable with gang members. For all of these reasons, gang problems that used to be street problems now occur in the halls and classrooms of high schools, junior high schools, and even elementary schools. First-, second-, and third-graders are no longer too young for gangs to recruit, train, use, and use up.

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## Gangs Share Common Characteristics

Before schools can develop plans to limit gangs' access to and impact on students and staffs, it is necessary to define what a gang is and learn how to recognize a gang's members and influence. Gangs share certain characteristics, including:

- exclusion of nonmembers
- gang territory
- gang identity
- gang rivalries
- antisocial behavior

Exclusion of Nonmembers

**Exclusion of nonmembers.** Gangs interact together to the exclusion of others. While gangs that mix racial and ethnic backgrounds do exist, most gangs tend to be chauvinistic in the sense that gang members associate only with their "own kind" and demonstrate a distrust and hatred of—thus isolating themselves from—people of different racial and ethnic origins.

Gang member isolation is not just from people of different colors and origins; their isolation is also from other people of their own race and ethnic origin, including their own families. A common theme in gang membership is that your fellow members—your home boys or "homies"—are your family. Fellow gang members are friends, lovers, brothers, and sisters; they are the the people who protect and nurture you, and the people you protect and nurture. If you belong to a gang, you do not need anyone else. Your needs—emotional, physical, social, economic, and even spiritual—are met by your gang.

Gang Territory

**Gang territory.** The territory or area a gang claims has traditionally been a geographic area: a square block, a section of a city, an entire school, or one courtyard in the school. Of late, the gang territory has assumed a more economic or corporate niche that is defined by the vice or crime that is the basis of the gang's economic livelihood. Most commonly, the enterprise is the distribution and sale

> *Gang members are among the ultimate conformists, with the kind of exacting attention given to conforming to gang standards that could make military drill sergeants look slovenly.*

of illegal drugs, with a tendency to specialize in one drug or form of a drug, such as crack, methamphetamines, or "designer drugs." The choice of drugs may be influenced by the gang's ethnic composition. For example, methamphetamines are usually sold by biker or white supremist gangs. Gangs are often business enterprises and must be recognized as such. Gang members are not stupid, disorganized, or unable to appreciate capitalism in its rawest and most basic forms.

### Gang Identity

**Gang identity.** Gangs have names by which they are known to others and with which they associate themselves. Gang members also demonstrate affinity with each other and loyalty to their gang through their dress, appearance, verbal and nonverbal expressions, and actions. Gang members are not hippies, beatniks, or rugged individualists. Gang members are among the ultimate conformists, with the kind of exacting attention given to conforming to gang standards of clothing, grooming, and behavior that could make military drill sergeants look slovenly and laid-back by comparison.

### Gang Rivalries

**Gang rivalries.** Gangs have rivals and/or enemies. This enmity exceeds their natural opposition to and dislike for mainstream organizations like the police force, schools, and churches. Gangs need other gangs to help define who they are in much the same way that armies need opposing armies. A gang needs rivals before its turf is distinctive. It needs to have economic exclusivity or dominion in order for its crimes to have prestige. Within a gang, there may be recognition for killing a civilian or a police officer, but real fame comes with killing a member of a rival gang. One gang needs another gang to fully define its turf, expertise, membership, and crime.

Gang rivalries often work on a number of different levels. The rivalries may have an economic basis because rival gangs share the same market for selling illegal drugs, perhaps even competing within the market with the same kind of drug. Such competition leads to a constant challenge for market share that involves guns and knives, rather than double coupons and full-page color ads in the local newspaper.

The basic need for belonging that gang membership meets inevitably creates an "us" versus "them" dichotomy. Who "they" are is not adequately explained by simply stating that the category includes everyone who is not a gang member. More specifically, "they" must include at least one rival gang that proves, by comparison, that "we" are more powerful, superior, and dominant. For there to be a well-defined "us," there has to be a well-defined, rival "them" to oppose, humiliate, overrun, hurt, and even kill.

Antisocial Behavior

**Antisocial behavior.** Gang members are violent, antisocial and prone to criminal activity. Antisocial behavior is an essential characteristic of a gang. Gang members, individually and collectively, engage in this behavior through criminal acts; violent words, deeds, and symbols; and other disruptions to society. If gangs did not engage in antisocial behavior, we would probably encourage them. If you remove the antisocial behavior, a group of three or more students who interact together to the exclusion of others, claim a territory, have a name, and have rivals probably describes your school's football and volleyball teams. Schools would not be concerned if they had a group of students who called themselves the Westside Screamers, had crewcuts, wore white sports coats, claimed a part of the city in which they helped the elderly cross the streets, and set up tables in the school yard so they could provide algebra tutoring.

As educators, we must focus on the antisocial nature of the behaviors of gang members. If there are no behaviors (overt or threatened, physical or expressive) that harm or potentially harm anyone or that disrupt or potentially disrupt the educational process, there is no reason to waste time, energy, and credibility in opposing an organized group of students.

## Indicators of Gang Membership

Although there is no one characteristic or symbol that is absolute proof of gang membership, there are a number of characteristics that are commonly found in gangs and gang members:

- appearance
- admission and association
- language
- behavior

The more prevalent these characteristics are, the greater the likelihood of gang membership.

Appearance

**Appearance.** One indicator of gang activity is affecting the "uniform" look of a gang by changes in appearance through bodily modifications and the selection of clothing and jewelry.

***Bodily modifications*** can be temporary, such as hairstyles with gang signs razor-cut into the hairline, or permanent, such as tattoos, brands, and self-inflicted scars.

Gang ***clothing*** is a form of expression that clearly states, "I am a member of this gang." Other aspects of the message may not be as clear, but could include, "Be afraid of me," "I challenge you if you're a member of another gang," or "I am the local dealer for the gang's cocaine franchise."

The form of the clothing varies from gang to gang, and from time to time within a gang. Gang clothing could include plaid flannel shirts or starched white T-shirts, well-pressed khaki pants or baggy pants worn low enough to show underwear. Headgear could include bandannas, baseball hats worn backward, black hair nets, and cowboy hats. Corduroy bedroom slippers, expensive athletic shoes, and boots can become part of the gang "uniform," as can clothing that promotes a particular sports team, alcoholic beverage, or television program.

The color of clothing or accessories is a common gang indicator. The colors of red and blue have long-established affiliation with major street gangs. Color as an indication of affiliation is hardly new, with historic precedents in the colors of the British "Old School Ties" and the blues of the Montagues and the golds and browns of the Capulets in Shakespeare's *Romeo and Juliet*.

Certain types and styles of ***jewelry*** are frequently used as an indicator of gang membership. These may include gold earrings in the shape of skulls and rings with unusual designs. Elaborate crosses on neck chains can be used, perhaps out of appreciation of the jewelry's design, as a mockery of religion, or as a defense mechanism that allows the gang member to claim that his or her gang indicator is really an exercise of religious freedom.

Admission and Association

**Admission and association.** One of the strongest indicators of gang membership is ***admission*** of membership by the student. Gang members are not ashamed of their "brothers and sisters" and take pride in their association. Gang membership is a matter of pride and accomplishment, and is more likely to be bragged about than denied.

However, self-incrimination is not a strong trait in gang members, and questions about membership that can lead to removal from school or unwanted attention from the police are likely to be met with blank stares, hostile looks, or colorful language.

A claim of gang membership is not a guarantee of gang membership. Sometimes students will openly claim the membership they seek, but have been denied. This behavior is confusing to adults and endangers the student because legitimate gang members are vigilant about guarding the sanctity of their membership.

*Sometimes students will openly claim the membership they seek, but have been denied. This behavior is confusing to adults and endangers the student.*

Family members may also provide this information in an attempt to enlist you in their efforts to save their sibling, child, or grandchild. Reliable sources can include knowledgeable students or members of the community and official sources such as members of the police force, welfare agencies, or court system.

A student's membership in a gang can often be inferred from his or her ***association*** with known gang members. Association could include:

- Loitering with, riding with, or meeting with gang members.

- Selling or distributing drugs with or for a gang member. Simply buying drugs from a gang member does not make the student a member.
- Helping a gang member commit a crime.
- Being arrested with a gang member.
- Attending functions sponsored by a gang. Gang members socialize with each other. While their functions may not be exactly the same as initiation activities students endure during sorority or fraternity rush, a gang's "jumping-in" practices give new meaning to the term "hell week."

Language

**Language.** Possession of gang literature or school notebooks decorated with gang signs, markings, symbols, and slogans can be indicators of gang membership. Gang "writing" can be almost like calligraphy in its precision.

Gangs also have their own special languages which supplement their written language of graffiti and drawn, painted, or carved symbols. Words and phrases can take on particular meanings and definitions when used within the gang. Flashing of gang hand signs can also become a way of communicating membership and friendship or intimidating and challenging non-gang members.

Behavior

**Behavior.** Another highly reliable indicator of gang membership or aspirations for becoming a gang member is behavior. Does the student engage in the types of behaviors—especially antisocial behavior—associated with gang membership? Does the student use, sell, or distribute drugs? Does the student engage in threatening, intimidating, or physically violent behavior? Does the student "talk the talk" and "walk the walk" of the gang?

One possible indicator of gang membership is an increased sensitivity to real or perceived slights. Gang members tend to be hyper-vigilant in their interpretation of and response to real or perceived slights. This behavior results in misperceptions of hostile intent; misinterpretations of neutral events; and exaggeration of minor discourtesies, thoughtless behavior, or insignificant nastiness. A bad look can provoke a shooting. A careless shove in a crowded hall can lead to a free-for-all. A curt command from someone in authority can become a challenge to manhood and reputation.

## Indicators of Gang Activity in Your School

How do you know if you have gang activity in your school? The presence of one or more of the following indicators may confirm your suspicions:

- The general availability of drugs on and near campus
- Weapons in or near school
- High or increasing numbers of physical confrontations and "stare-downs"
- Pagers, beepers, and cellular telephones
- A high truancy rate
- Drive-by shootings at or near the school
- A community history of gang presence
- An increasing presence of "informal social groups" with menacing names
- Show-by displays of guns on or near campus

*Even if you do not think your school has a gang problem, look closer. It probably does.*

There is a statement in the mental health field that "if you think you have a drinking problem, you probably do." The same concept holds true for gang activity. If you think your school has a gang problem, it probably does. Even if you do not think your school has a gang problem, look closer. It probably does.

## Chapter 7-2

# Opposing Gang Activity

No matter how entrenched gang activity seems to be in your neighborhood and within your school, you can change the situation. Techniques for opposing gang activity include prevention and anti-gang education. Other techniques include using our skills and talents as educators to provide alternatives and understanding to potential gang members. Although there is no one plan or approach that will eliminate the influence of gangs in schools, the only approach that is guaranteed to have an effect is to *do something.*

## Use a Multifaceted Approach

Anti-gang activities require a multifaceted approach that attacks gang activity, gang membership and recruitment, and gang presence in the school. While there are very real legal limitations to addressing these problems, the courts recognize that schools have the inherent power to restrict organizations that can have a deleterious influence on the education of children. Courts will routinely defer to the knowledge and experience of educators in the operation of schools, as long as the educators' regulations are reasonable in intent, scope, and enforcement. Courts are not generally anxious to substitute their judgment on the proper operation of a school for that of the teachers, administrators, and school boards, unless the educators cannot demonstrate the reasonableness of their regulations.

Multifaceted anti-gang regulations must address gang activity on school grounds and during school activities, as

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well as off-campus activities that have a negative impact on the ability of the school to perform its educational function. The regulations must also address gang membership and recruitment from our student populations and restrict the indicators of gang presence on campus. However, you cannot legally exclude members of gangs from attending school. As educators, we want to keep all students in school as long as their behavior does not interfere with the rights and safety of other students or staff. Nor can you prohibit students from joining gangs. A student's right to associate with people of his or her own choosing is an extension of the constitutional right of free speech. However, you can and should restrict gang members from exhibiting the indicators of their gang membership while they are at school.

*You cannot legally exclude members of gangs from attending school. Nor can you prohibit students from joining gangs. A student's right to associate with people of his or her own choosing is an extension of the constitutional right of free speech.*

## Increase Staff Awareness

Train the entire staff—administrative, teaching, and support staff—on indicators of gang membership, methods of gang prevention, and intervention alternatives. Provide opportunities for staff to develop the skills they need to help children realize they can have their needs met by caring adults and through exciting activities without joining a gang. Staff development should also include training in safety measures and techniques.

## Establish Clear Behavioral Guidelines

Any regulation, and especially a regulation to combat gang presence, must establish clear behavioral guidelines. A regulation that prohibits membership in a particular gang is likely to run afoul of the constitutional protection of free association and be open to claims that the regulation is too broad in that it seeks to prohibit extracurricular nonschool activity. A regulation that attempts to control thoughts or feelings is both unconstitutional and unenforceable. However, a regulation that prohibits wearing an accessory of a particular gang, such as a belt buckle in the shape of a snake swallowing a rat, is enforceable. Focus on behavior that disrupts and intimidates, not on thoughts or beliefs.

Developing and enforcing a model dress code can be useful in limiting the appearance, if not the presence, of gang activity on campus.

*Focus on behavior that disrupts and intimidates, not on thoughts or beliefs.*

## Teach an Anti-Gang Curriculum

Develop a gang prevention curriculum that begins in the primary grades. This curriculum could include information on the negative aspects of gang membership and help students learn the skills they need to resist the recruiting efforts of gangs. These skills include problem solving, anger control, dispute resolution, and mediation. In addition, a teaching style that uses a variety of techniques to help a child experience success will increase that child's self-esteem and help him or her resist gang activity and membership.

## Create Graffiti-Free Zones

Keep the school's physical plant free of gang signs and symbols. When graffiti appears, read it, record it (for documentation purposes), and remove it quickly. Every hour that the graffiti remains visible, the graffiti artist and his or her gang members experience power and pleasure while the rest of the student body experiences intimidation and/or annoyance. Even if you cannot immediately repaint the entire wall to make it look like there was never any graffiti, you can immediately paint over the affected area and cover the graffiti.

## Set Up a School Gang Hotline

A school gang hotline can be a part of your drug and/or violence hotline. Give students, parents, and members of your staff and community a number they can use to anonymously call in tips and other information about gangs and their activities. The information you receive could help you identify problem areas and focus your anti-gang efforts.

## Provide Victim Support

Support those who are threatened or victimized by gang violence. Always report criminal gang activity to the police. Debrief students who are victims, and provide them with counseling if needed. If necessary, modify their educational program to remove them from future threats or violence. Monitor the victims of violence to prevent retaliation or further violence. Consider providing special transportation until the situation calms down. Let the victims know you care and that what happened to them was wrong and unacceptable, and that you—as a person and a representative of the school—will try to make things right.

## Provide Exciting Activities and Alternatives

Provide students with the most varied, vibrant extracurricular programs the school can afford, and then beg and borrow more funds to create more programs. Gangs provide something to do, some place to be, and someone to be with. Give students something better, more exciting, safer, and more productive. Give students something to do, something to entertain them, and somewhere to be that encourages positive peer interaction and increases a student's sense of identity and success.

*Give surveys to identify your students' interests, and then beg resources from local, state, or national businesses to help you offer programs based on those interests.*

Excellent activities include intermural and intramural sports programs, but they are not the be-all and end-all of extracurricular programs. Pick programs that offer something for your students. If your students are interested in auto mechanics, photography, movies, electronic games, computers, or dancing, make every effort to provide programs that encourage and develop these interests. Give surveys to identify your students' interests, and then beg resources from local, state, or national businesses to help you offer programs based on those interests.

## Be There for the Students

Give of yourself. Too many of the children who join gangs do not have reliable, strong, and loving adults in their lives. You cannot become their parent. Nor can you singlehandedly save one, let alone all, of the children you encounter. However, you can show them that you care about them and think they are important enough to warrant your respect and attention. Give the children the ability to earn self-respect by setting boundaries for their behavior. Care about the children enough to give them boundaries, explain the purpose of the boundaries, and require them to live within the boundaries. To be a child or a teenager adrift in a world with no rules is frightening.

## Involve the Parents

We recommend programs that tell parents about their children's school activities, successes, and needs. If there is any apparent gang activity, notify the parents in neutral, non-condemning terms. Offer parenting skills training to help them turn their child away from gangs and violence.

## Coordinate Efforts with Others

Coordinate anti-gang resources and efforts with other agencies. Work closely with police officers, juvenile probation officers, and members of the various welfare agencies. This coordination can involve shared information and should definitely involve bringing charges and testifying whenever an educator is the victim of or witness to a criminal act.

## A Process for Opposing Gang Activity

The following process and generic guidelines are provided as a starting point for developing strategies and regulations that address gang activity (or the potential for it) in your school.

1. Define "gang."
2. Create a set of clearly defined, behaviorally based rules that restrict conduct on school property and during school activities. Items to be included are:
    - Restrictions on wearing, possessing, using, distributing, displaying, or selling any clothing,

jewelry, emblem, badge, symbol, or sign that indicates membership in or affiliation with any gang.

- Regulations that prohibit any act or omission, including the use of any speech (verbal, written, or nonverbal, such as gestures, handshakes, etc.), which shows membership in or affiliation with any gang.
- Regulations that prohibit any speech, act, or omission that is intended to, or has the effect of, furthering any gang or gang activity. These prohibitions include:
  - Soliciting others for membership in a gang.
  - Requesting any person to pay for protection or otherwise threatening or intimidating any person.
  - Committing any illegal act or any violation of school policies.
  - Inciting other students to act with physical violence upon any person.

These regulations must be personalized to address the needs and conditions found in your school and your community. Such regulations are much more subject to legal challenge if they are generic. Thus, start with other schools' anti-gang regulations, and then modify them to meet your specific needs after consulting with your students and their parents; members of your staff and administration; and members of the community, local businesses, the police force, and governmental agencies.

## Chapter
## 7-3

# Controlling Gang Activity through Appearance

Appearance is one of the defining aspects of belonging to a gang. Clothing, accessories, electronic gadgets, and hairstyle can identify the gang a student belongs to and be a visual reminder to other students of gang activity. In addition, such items of appearance can be a visual threat to members of rival gangs, increasing the likelihood of disturbance and violence on school grounds. Thus, a school can take a significant step toward controlling gang activity on campus when it develops and enforces rules on student appearance.

## Legal Theories on Student Appearance

The initial legal theory on appearance was that it was a minor rhetoric, a limited form of expression. As long as the restrictions placed on dress were not arbitrary or capricious and were made by a reasonable person, the school was free to impose them. If a reasonable person thought dressing a certain way made students look weird or strange, the school could ban that mode of dress.

In the 1960s, the legal theory on appearance took a wide pendulum swing in the other direction. When schools forbade students to wear black armbands to protest the Vietnam war, the legal case that ensued—*Tinker v. Des*

### The Tinker Decision

*Moines Independent Community School District* (1969)—resulted in a court reversal of the ban. In its opinion, the court held that appearance is a form of expression, and the right of expression is constitutionally guaranteed. The court further held that this fundamental right could not be interfered with unless there was a compelling state interest.

The first view held that schools could control student appearance unless they did so in an unreasonable way. The second view held that schools could not control student appearance unless they could establish that a major harm would come to society if the appearance were not controlled. Schools today would be governed by the Tinker decision if they sought to restrict aspects of student appearance that were directly linked to gang membership and activity. What could be a more compelling state interest than fostering a safe educational environment? If allowing students to wear gang attire reasonably could incite others to disruption or violence, the school could ban such attire. To ban any item of appearance under the Tinker decision, the school would need to show that the item would present a material and substantial interference with the educational process.

### Cowboys and Hippies

The legal theory concerning student attire continued to evolve. Elements of the evolution of a school's ability to control student appearance can be explained in part by a number of incidents that also occurred in the 1960s. Several decades ago, some schools were faced with "cowboy" groups of students who showed their distaste for the appearance of "hippie" groups of students by beating up students who dressed like hippies. To stop the disruption, schools banned hippie attire, even though the students wearing such dress had done nothing to provoke the attacks. The schools defended their action by contending that schools have to make a distinction between the kind of behaviors that some people find so offensive it may cause them to act out and the kind of behavior that is likely to create danger and interfere with the normal operation of the schools. Those who knowingly wear clothing that will incite violence are provoking that violence. In short, the schools argued that wearing such clothing was the equivalent of crying fire in a crowded theater and must not be allowed. Courts rejected this argument and suggested that the schools discipline those who reacted with violence, rather than limiting the expression of other students.

The law regarding appearance is now evolving to a compromise between the first two viewpoints. Current legal theory recognizes appearance as a constitutional right but not a substantial constitutional right, and a right which can be balanced in some circumstances. This returns us to using the "rational reason" standard discussed elsewhere in this book. If challenged in court, to legally restrict student appearance, you must show that you have a rational reason for doing so. Showing this could be as simple as stating, in writing, what your problem was and how the problem interfered with the effective operation of the school. For example, you could say, "We have four different gangs whose members attend our school. There was continual violence and threats of violence in the school because of gang members fighting with one another. Non-gang member students and faculty have been intimidated because of the presence of the gang members. Their presence stifles expression from other students and causes the following disruptions in school: [list disruptions]."

*To legally restrict student appearance, you must show that you have a rational reason for doing so.*

You should also have expert testimony, probably from juvenile court or law enforcement officers, on the relationship between the prohibited aspects of appearance and gang activities. The connection between the attire and gang membership must be made.

## Drafting Rules and Regulations

If the district can establish through consultation with local law enforcement agencies, the juvenile court system, or local gang experts that certain clothing and/or jewelry are used to show gang affiliation, then you are allowed to draft very narrow and restrictive rules and regulations that limit or ban the wearing or display of these specified items because of the potential dangers that flow from this situation.

We would suggest that you draft such provisions with care to ensure that they are not discriminatory. For example, a policy that does not permit African-American or Hispanic students to wear certain things, but allows white students to do so, is discriminatory on the basis of race and would not be allowed by the courts. A policy that bans attire favored by African-American or Hispanic students generally, as opposed to attire favored by gang members specifically, would also be subject to challenge.

To draft anti-gang regulations effectively, and legally, you need to work from the doctrine of reasonableness. There is no question that gang activity is serious business, and the more serious the offenses, the harsher the discipline can be. Nevertheless, the type and degree of punishment can have a serious impact on the constitutionality of an otherwise permissible regulation. Thus, even in the area of regulating gang activities and gang violence, reasonableness is still an important consideration. If your punishment is seen as unduly harsh, there is a greater likelihood that the courts will reverse your action than if your punishment is viewed as reasonable.

A simple and often effective form of discipline is restricting students from extracurricular activities. Some people might disagree with this ban having a deterrent effect. Their argument is that these kids hate school anyway, and not letting them spend more time in school-related activities is really no punishment at all. In a few cases, this may be true. However, we are constantly amazed at how many students will obey rules rather than risk losing their ability to participate in these activities, which for them are a compelling part of their reason for attending school. Participation in school sports activities, social events, and field trips are important to the vast majority of students.

## Controlling Violence and Gang Activity

One of the most important things you can do to control violence is to place limitations on gang activities. Students do have a constitutional right to freedom of association. As a result, any regulations you draft must focus on gang-related activity, not membership in a gang. You cannot legally say to a student, "If you belong to a gang, you cannot come to

*Any regulations you draft must focus on gang-related activity, not membership in a gang.*

school." What you can control—and must strive to control—are displays of membership in disruptive organizations while students are on campus. This control can be legally sought through a number of actions.

Define "Gang"

**Define gang.** If you are going to ban gang activity, you need to define the term "gang." It is safe to say that one person cannot be a gang, so we can define a gang as any association of people who have banded together to participate in activities that are disruptive, illegal, and/or violent.

Speech, Gestures, Symbols

**Limit gang-related speech, gestures, and symbols.** Be specific. The rules cannot prohibit all gestures, or you would have to discipline students for shaking hands or shrugging their shoulders. Update rules as needed when gang-related communication changes.

Recruiting Activities

**Prohibit recruiting activities.** Do not allow recruiting activities, threats or intimidation, offers of "protection" for money or favors, etc. Not only do you have the right to do this, you also have the legal obligation to do so.

Gang-Related Objects

**Limit the wearing, distribution, display, or sale of gang-related objects.** You have to be very careful in your definition of what these items are in order not to illegally restrict a student's right to expression. But where law enforcement people have verified that wearing an Oakland Raiders jacket and a gold earring in the left ear indicates gang affiliation, these items can be banned. Gang-related hair style and jewelry can be prohibited as well. If they are not banned, there is a reasonable chance that disruption and violence will occur.

Pagers and Cellular Telephones

**Ban the wearing and use of pagers and cellular telephones.** When students are supposed to be learning, there is no telephone call so urgent that a student could not ask to go to the office or a public phone to make it. Incoming calls on pagers are disruptive to other students as well. The best rationale for this rule is that these devices can disrupt the educational environment.

**Include other visual distractions.** You can control skirt lengths, spaghetti straps, and see-through blouses to some extent. Students wearing clothing of this nature are sexually distracting to others and undercut the primary purpose of education. To some extent, you can also control clothing with words and/or pictures on them, using the same rationale. You cannot restrict a student's right to free speech, but you can put some limitations on how it can be exercised in a school setting. For example, wearing T-shirts that suggest illegal drug use can be banned. Garments with such slogans as "Drink 'Till You Puke" or "Smoke Camels" can also be banned because students, who will nearly all be under 18 years of age, are being encouraged to break the law.

Expensive Clothing, Accessories

**Ban expensive clothing or accessory items.** Expensive jewelry and footware may be symbols of gang membership. Even if they are not, however, expensive items are in great demand by others, who may be tempted to steal them. Banning these items removes the temptation.

## Avoid Vague, Broad Regulations

Vagueness in rules and regulations will almost assure their being overturned by the court. If a court has difficulty understanding what your rules are trying to prohibit, they may very logically think that your students also have difficulty understanding them. The rules have to be clearly written so that those bound by them will know when they are violating them. A rule that states that "the wearing of gang-related paraphernalia is prohibited" is too vague. How are students supposed to know what gang-related paraphernalia is? If, on the other hand, the rule states that "the wearing and/or displaying of red, pink, or blue polka dot bandannas is prohibited," it is specific enough to ensure students will know whether they are breaking the rule.

Rules and regulations that prohibit certain aspects of student appearance must be drawn as narrowly as possible. The broader your restrictions are, the greater the intrusion on your students' rights to express themselves. The greater the intrusion, the more likely the restrictions will be ruled unconstitutional. For example, if you have a rule that says "No team sports paraphernalia may be worn on campus," the rule is unnecessarily broad and will probably be considered too intrusive. If you simply prohibit sports paraphernalia for those specific teams whose names and images have become affiliated with student gangs, your rule will stand on much firmer legal ground.

# Case Study

## Handling Contraband

**A student has brought a prohibited item to class. May I confiscate the item? Must I return the item?**

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Yes, and generally. Schools have lists of property which students may not bring onto campus or possess while they are on campus or participating in a school-related activity. Some of these items are inherently illegal. Schools prohibit students from possessing weapons, illegal drugs, alcohol, and tobacco. In addition, schools prohibit student possession of sexually explicit materials; materials that are racially, ethnically, religiously, or sexually biased, derogatory, and inflammatory; or such items as Walkmans, pagers, or cellular telephones, which are disruptive or can be used in illegal or gang activities.

In addition to the school rules, teachers have their own rules about what items are allowed and what items are prohibited in their classrooms. Many teachers prohibit food or drink in class. Others prohibit radios, tape players, hand-held video games, or other items which distract the student who has them and/or the surrounding students.

Regardless of the rules, some students will bring prohibited items into the classroom. Are you required to ignore the prohibited items? The answer is clearly no. If you become aware of contraband, whether prohibited by school rules or class rules, you are legally justified in asking the student to give you the item. Most of the time the student will comply. If the student refuses, either by hiding the contraband or simply refusing to obey, do not grab the student and try to take the item by force. This creates disruption, potential legal liability, and accomplishes little or nothing of value. If the student is defiant in this way, you should refer the matter to the administration for appropriate action.

If the contraband is potentially dangerous, such as a weapon or drugs, try to move the student and/or classmates to a different location and then call the administration. If a student turns over contraband that is prohibited by school rules, you should not return it directly to the student. Instead, give it to the administration and let an administrator handle the school discipline issue and decide whether and when the property is to be returned. If it is marijuana, the property will be turned over to the police and the student is not likely to see it again. But if the property is a Walkman, it will likely be returned to the student—or given to the student's parents—with a warning not to bring it to school again.

Should you return property if it violates your classroom rules? Generally, yes. You can return the property to the student, contact the parents and return the property to them, or turn the property over to the administration to handle. If Jim is poking another student with his pencil and you take the pencil, you will normally return it at the end of the class period or school day. (But if Jim repeatedly pokes other students with his pencil, the issue quickly moves beyond confiscation to student discipline.) If the confiscated item is of more than a nominal value, we recommend that you turn the item over to the administration and have an administrator handle it. Items of nominal value, such as a pencil, some candy, or a comic book, can be seized and returned by the classroom teacher. In this way, you avoid the issue of whether you did or did not return the item. If you confiscate money, always turn it over to the administration. Ask for a receipt and/or prepare a memo on what you confiscated and who you gave it to. Small consumables, such as a piece of candy, can be discarded.

For information on search and seizure, see the case study, "Search and Seizure," at the end of Part 2, Effective Discipline.

# PART 8

# Violence

Chapter 8-1 Characteristics of Violent Youth

8-2 Vandalism

8-3 Bullies

8-4 Defusing a Crisis Situation

8-5 Reasonable Force

8-6 Self-Defense

8-7 Weapons on Campus

Case Study Weapons as Self-Defense

## Chapter 8-1

# Characteristics of Violent Youth

Acts of violence present one of the greatest challenges to school safety and discipline. Essential to any effective treatment of violence is the need to understand the problem so we can avoid overreacting to an out-of-character disturbance or underreacting to an emerging pattern of misbehavior. A single instance of childish acting out or a single scuffle between third-graders does not herald a life of crime. But when a single scuffle in third grade is followed by several fights in fourth grade and bringing a knife on campus in fifth grade, lack of action due to complacency or fear can allow an emerging problem to grow until the student's misbehavior becomes dangerous and almost beyond remediation.

Violence and disruption come in almost innumerable forms. While violence is unique and personal in its expression—both for the victim and the victimizer—acts of violence and those who commit them generally share certain common characteristics. Although it is important to avoid stereotyping—not everyone who fits a profile will commit a violent act—it is equally important not to ignore characteristics that are commonly found among gang members, criminals, and victims. Identifying these characteristics is especially important when an individual has not yet become a gang member, criminal, or victim and can be turned from those paths by compassionate and strong intercession.

*Students who are not challenged when they express early signs of physical aggression are more likely to progress to more serious acts of aggression and violence.*

Violence and disruption occur with different levels of severity. Refusing to cooperate with a teacher is certainly not as serious as assaulting a teacher with a deadly weapon. However, students who are not challenged when they express early signs of physical aggression are more likely to progress to more serious acts of aggression and violence. Few honor students become criminals without first passing through one or more increasingly violent levels of behavior.

## Levels of Violence

Children are excellent learners. If we do not teach them appropriate behavior, they will certainly and brilliantly learn inappropriate behavior. A child can learn violence by experience. If a child is beaten, belittled, and threatened, the child can easily learn to be cruel and aggressive. A child who is neglected physically or emotionally can easily learn to be indifferent to the feelings and safety of others. A child who is not challenged when expressing minor defiances, cruelties, and acts of self-centeredness can learn to deaden his or her conscience and feelings of morality and compassion.

Each unchallenged act of violence makes the next act of violence easier to commit, as the child's behavior escalates into increasing levels of violence. And because each act of violence tends to numb any remaining pangs of conscience or feelings of compassion, the child who victimizes others also becomes a victim of his or her own violence. As educators, we have the opportunity to identify when a child begins this cycle of violence and to take steps to break the cycle. Identifying a progression of lower-level aggression can help predict a pattern that could escalate without firm and caring intervention.

Studies of disruptive children have shown that their teachers' assessments of their antisocial behavior were accurate predictors of the violence and disruption that occurred almost a decade later. As educators, we need to examine those levels of violence that, if left unchecked, can expand to new and increasingly dangerous levels. Acts of aggression and violence can be placed generally into three categories: early, intermediate, or advanced.

Early Levels of Aggression

**Early levels of aggression.** Early levels of aggression include:

- A general refusal to cooperate with authority figures. The classroom teacher is almost always the first to notice this characteristic, which is then expressed to administrators, other teachers in general, and then to anyone else the student decides to defy.
- A growing tendency to argue and act belligerently with the faculty and fellow students.
- Increasing or repeated use of profanity, obscenity, vulgarities, abusive language, sexual comments, and racial and ethnic slurs.

Intermediate Levels of Aggression

**Intermediate levels of aggression.** If early acts of aggression are left unchecked, the student is likely to progress to intermediate levels of aggression, which include:

- More frequent and serious arguments with teachers, principals, and fellow students.
- Active defiance of a teacher's orders and failure to comply with school policies.
- Acts of retaliation for real or perceived wrongs or slights.
- Theft or destruction of property.
- An expressed desire to hurt staff members or other students.
- Verbal, written, and/or physical threats toward others.
- Verbal, physical, and/or written sexual harassment.

Advanced Levels of Aggression

**Advanced levels of aggression.** Just as successful students learn to communicate and reason more effectively, aggressive students can become more effectively violent and disruptive as they move into advanced levels of violence. This final level can include:

- Physical threats that are followed by acts of violence. Fights become more common and assaults take the place of mutual combat.

- Increasingly severe and open displays of anger and aggression.
- Use of weapons as tools of defense, offense, and status.
- Sexual assault.

## Characteristics of Violent Youth

*The Centers for Disease Control has identified violence as a major illness of society and children in the United States.*

The Centers for Disease Control has identified violence as a major illness of society and children in the United States. Although there are no effective vaccines for preventing violence from taking root, educators can identify children who are more likely to resort to violence and help them resist acts of aggression and violence.

There is a constellation of traits, characteristics, and behaviors that are found in violent and at-risk youth. No one student will have all of the characteristics. Possession of one, five, or even ten of the characteristics does not justify separating the student from society. Only antisocial or criminal behavior warrants discipline or arrest. However, understanding the traits that can precede or signal antisocial behavior will help you identify students who may need help changing their behavior.

Violence

**Violence.** The first accurate predictor of violence is violence. The student who associates with others who make threats of violence or engage in violence is more likely to model the aggressive or violent behavior of his or her companions. Students who threaten violence are more likely to engage in actual violence. Students who engage in violence are more likely to engage in continued and increasingly serious levels of violence. A violent environment is the world's most effective breeding ground for further violence. Students who are the victims of violence in their families are far more likely to turn to violence and victimize others.

Unusual or Changed Behavior

**Unusual or changed behavior.** Other factors to view with care are unusual or changed behavior on the part of the child. A teenager who has been a good student but suddenly begins failing classes is a danger sign. Other signs of trouble that can lead to aggression and violence include a change in attendance, decreased productivity, inconsistent study and work patterns, and poor or deterioriating peer relationships.

Other Warning Signs

**Other warning signs.** The following factors may also indicate that the child is on the verge of slipping into early levels of aggression:

- Fascination with or repeated discussion of guns, other weapons, violence, and crime.
- A change for the worse in appearance, dress, or cleanliness.
- Evidence of possible drug or alcohol use.
- Evidence of serious stress in the student's personal or school life.
- Persistent or newly developed problems with concentration.
- Patterns of making excuses, blaming others, and failing to accept responsibility for personal actions.
- Symptoms of depression, which may include low energy, lack of enthusiasm, cynicism, and despair.
- Increased expressions or indications of frustration with school, family, or friends.
- Personality magnification. The student becomes what he or she was, only much more so, with an emphasis on traits that are particularly dangerous, aggressive, obnoxious, or antisocial.

Students who are experiencing severe problems in their lives will often send out warning signs. Often children and adults who are contemplating suicide will give warnings by beginning to talk about death and/or suicide and hinting at their despair, pain, and fear through subtle and overt clues. Similarly, students contemplating violence may be troubled and disturbed by their own thoughts and emotions, and may be hoping someone will intervene. If we ignore these cries for help, we harm both the student who engages in violence and the other direct and indirect victims of that violence.

## Meeting Unmet Needs through Violence

Perhaps the most fundamental characteristic of violent youth is that they are trying to meet one or more basic needs through their acts of aggression and violence. These needs include physical, safety, belonging, and self-esteem needs—four of the five basic needs ranked in a pyramid hierarchy by noted psychologist Abraham Maslow in his Hierarchy of Human Needs.

Physical Needs

**Physical needs.** Children have basic physiological needs for food, sleep, and shelter. Unfortunately, many of our students come to school without having these needs met. Many children are hungry because their parents cannot afford to provide them with adequate food or, worse yet, do not bother to provide them with adequate or healthy food. Many students come to school tired because their parents did not allow or make them go to bed at a reasonable time. Too many of our students do not receive adequate medical attention for injuries; minor, chronic, or serious illnesses; and physical, mental, and emotional disabilities. As a result, these students may turn to acts of aggression and violence in their efforts to meet these basic needs. To expect these students to behave, let alone learn, when they are hungry, tired, and sick is not realistic.

Need for Safety

**Need for safety.** Children also need security, stability, structure, and protection from fear and chaos. If a child cannot find safety with his or her parents, the child will look elsewhere. If the school and the community do not meet these needs, the child will look farther afield and may join a gang. Gangs are almost universally referred to as families by their members. The child may decide that joining a gang that offers a sense of safety—even though the "safety" is secured with violence, crime, and an uncertain future—is better than having no family at all.

A child may try to provide his or her own warped version of safety in violence and aggression. If a student feels bigger, stronger, meaner, or better armed, he or she is not as afraid, or at least is able to stand the fear. If a student belongs to a group that is more violent or more dangerous than the surrounding environment, then he or she gains a feeling of security and safety.

Need to Belong

**Need to belong.** Children who do not feel they belong may turn to gangs, crime, violence, and chronic acting out. They may also use drugs and alcohol to dull the pain of rejection and may take other foolish, hazardous risks because they feel their own life has little value. Children who feel they have no friends may easily hurt other people. Like a mirror image, the child is likely to "give back" what he or she is given. If the child is made to think his or her life has no real value, the child is likely to not value the lives of others.

Students will go to great lengths to meet their need for love and friendship if it is not met by their family, school, or community. Membership in a gang will give students a sense of belonging. As gang members, students know there are people who like, value, and need them. If we expect students to give up violence and leave their gangs, we must provide ways of meeting their need to belong.

Need for Self-Esteem

**Need for self-esteem.** Self-esteem is vital to self-identity. If parents do not respect their children's successes, if schools do not recognize their students' talents and efforts, and if the community does not appreciate the potential of its youngest members, these children will look for other ways to build their self-esteem.

The struggle for self-esteem is a struggle for recognized ability and superiority. If these children join gangs, they can be respected if they are good fighters, admired if they can organize profitable drug deals, and considered competent if they can steal and strip a car and sell the parts to a chop shop. In general, the more inferior a person feels, the stronger and more violent his or her struggle for recognition and superiority will become. If we want our students to abandon these dead-end routes to building their self-esteem, we need to develop many positive, encouraging paths for students to follow to earn respect and build a healthy sense of self-worth.

## Chapter 8-2

# Vandalism

At almost half a billion dollars a year, the cost of responding to acts of vandalism prevents schools from funding new student programs and staff development, hiring new staff, investing in new technology, and providing raises for teachers and staff. Schools are popular targets for vandalism. They are often empty and dark during evenings and weekends, giving the vandals time and cover to complete their destruction. As everyone's property, schools are seen as no one's property. Schools also discipline students. Revenge for this discipline is a common motive for acts of vandalism.

Not only do acts of vandalism divert school money that would be used to educate children, vandalism also contributes to a general environment of disrespect and lack of discipline. Preventing vandalism will help create a school environment that is more conducive to learning, cooperation, and proper behavior. There are a number of strategies you can use to minimize the threat of vandalism: you can harden the target, occupy the buildings, keep the buildings bright and clean, respond to vandalism with moderation, appeal to students, and offer an incentive.

## Harden the Target

Although you can never make a building so secure that a dedicated vandal cannot get to it, you can make your building so difficult to get to that vandals decide it is not worth the trouble and move on to an easier target. Of the most common ways to harden the target, lighting

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offers the best cost-to-benefit ratio. The more light you have around the school grounds and buildings, the harder it is for a vandal to work without being seen and interrupted. Increase the benefit of your lighting by eliminating or trimming bushes, other plants, and structures that can provide cover for vandals and give them the time they need.

*The more light you have around the school grounds and buildings, the harder it is for a vandal to work without being seen and interrupted.*

Strong locks, fences, and security alarms also make your school a less attractive target. If you have an alarm system, advertise it. Post signs from the alarm company in prominent locations throughout your campus. It is better to deter a vandal than to catch one. If vandalism does occur, always respond to the destruction immediately to eliminate any pride or sense of accomplishment the vandal would have when seeing his or her handiwork. Paint out graffiti and remove or repair damaged items.

## Occupy the Buildings

Occupied buildings are the ultimate deterrent. Vandals will seldom work when people are about. Making the school facility available as a community center will keep it occupied on evenings and weekends and will also increase the community's sense of ownership in the school. Community members are more likely to report vandalism if they feel a personal ownership.

In addition, making the school available for youth activities, such as pick-up games of basketball, may provide the very students who would vandalize the facility with a sense that the facility is their own. Even vandals will not damage or destroy something they think of as their own, like their place to play basketball.

Other techniques to keep your buildings occupied at night are to shift custodial duties so that there will always be someone on duty and moving around the grounds. A number of schools have also set office space aside to serve as police or sheriff's department substations. The idea of police officers and police cars coming and going 24 hours a day can make vandals very nervous.

Other schools have set up mobile home spaces and allowed custodial or maintenance personnel to move their mobile homes onto school grounds. The employee gets free lot rent and utilities, and the school gets a 24-hour-a-day security guard.

## Keep the Buildings Bright and Clean

There is a strong correlation between high levels of vandalism and obsolete facilities and low staff morale. Although building new schools is not a practical solution to the problem, there is no reason our current buildings should be dank and dreary edifices. Low-cost efforts can go far in livening up a school's appearance. Use bright colors on the walls, and display posters and pictorial demonstrations. Prominent displays of student art and achievements will increase student interest and pride in their school. Bright displays of optimism and enthusiasm by the staff will carry over to the students.

## Respond to Vandalism with Moderation

Throughout this book, you will read about the twin dangers of over- and underreaction. Responding to vandalism involves this same paradox. There are clear and strong correlations between high rates of vandalism and schools that have harsh, negative environments with autocratic and authoritarian leadership. Conversely, there are clear correlations between high rates of vandalism and schools that have unclear or inadequate rules with weak or inconsistent leadership. The most effective approach is to develop and communicate clear, firm rules that are fairly and consistently applied.

## Appeal to the Students

Appeals to the student body and even to potential vandals can also reduce vandalism costs. Vandalism prevention education can include classroom and general assembly instruction on the real cost of vandalism. Discussion of how vandalism takes money away from student programs and appeals to student pride can be supplemented with lectures

*Vandalism prevention education can include classroom and general assembly instruction on the real cost of vandalism.*

and demonstrations. Teachers can take students on vandalism awareness walks, contrasting the reality of the wastefulness, foolishness, and ugliness of vandalism with the students' mental picture of a guerrilla hero who is tweaking authority in a harmless way. Police officers, locksmiths, and others who deal with the impact of vandalism can give students a better understanding of the harm vandalism can produce. Such educational efforts can be enhanced by having a poster contest for students to create their own anti-vandalism messages.

## Offer an Incentive

An incentive can also be an effective tool for preventing vandalism. Schools can make a good estimate of their annual vandalism cost. At the beginning of the year, the school should select a target dollar amount that should not be exceeded. In an assembly, the faculty can announce a vandalism prevention fund. At the end of the academic year, if the actual cost of the vandalism (including staff time) has not exceeded the designated amount, then the difference between the designated sum and the actual cost will be provided for use at a "ditch day" for the students with food and entertainment paid out of the fund. In addition to providing a financial incentive for students not to commit vandalism, the other students are provided with a motive beyond simple goodwill for talking their friends out of vandalism and turning in those who are messing up their chance for a party.

## Chapter 8-3

# Bullies

Schools are required to provide a safe learning environment. This requirement includes addressing one of the earliest forms of violence—the emotional and physical violence used by bullies. If we fail to control this problem, we help create a disruptive environment that can leave the school and its teachers subject to liability for potential negligence. If the school and its staff are aware of a dangerous situation involving students and do not take reasonable efforts to address the problem, liability could follow.

There is a tendency to think of bullying as a normal part of childhood, a rite of passage to be endured, an example of "kids will be kids." This is wrong. Bullying is a serious problem in our schools. An estimated 15% of all elementary school children are either bullies or the victims of bullies. Every year that we allow bullying behavior to continue unchecked, we lay the groundwork for more serious problems in the future. If we want to stop adult crime and high school violence, we need to teach young children that there are alternatives to using fists, feet, clubs, knives, and guns. To allow bullying to go unchecked causes even greater harm to the bully and to the future victims than to the current victims—and the cost to the current victims is great.

It is not difficult to envision the positive impact on teen and adult violence we would have if we could eliminate this chain of violence at the elementary school level. Children who learn to be strong, assertive, and confident can resist being victimized by a schoolyard bully and present very

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unattractive targets for gangs and others who resort to violence. Children who learn skills for handling other people and their own frustrations without resorting to bullying tactics are far less likely to become gang members and gravitate toward lives of crime. Because bullying behavior—and the victims it creates—can lead to gang membership and increased violence, we advocate a program to reduce bullying as a critical starting point to any effort to eliminate school violence.

*Every year that we allow bullying behavior to continue unchecked, we lay the groundwork for more serious problems in the future.*

## Assess the Severity of Bullying on Campus

The first steps in addressing the behavior of bullies is to admit the existence of the problem and to assess the problem's severity and the kinds of bullying behavior present in your school environment. Have faculty, staff, and students respond to a questionnaire on acts of aggression and violence. Find a way for younger children to provide confidential, oral answers to the questionnaire. Make sure you include all staff members because custodians, classroom aides, and the school secretary often have an excellent understanding of how children are interacting.

## Develop Clear Rules of Behavior

After ascertaining the extent of the problems with bullying, a school needs to develop clear, straightforward rules of behavior. These rules must be communicated to the faculty, students, and parents. The school also needs to provide adequate adult supervision at recess, during lunch periods, and before and after school. The school must enforce a strict and consistent discipline policy, but discipline should not include physical punishment. The worst message to send a bully is that a bigger and physically more powerful adult can hurt him or her and be justified in doing so.

## Express Clear Repudiation of Bullying

All adults at the school must clearly express the unambiguous message that physical and mental mistreatment of other people is not just forbidden, it is also against the school community's moral and social norms. This message must be expressed in words and reinforced in attitude and action against bullying behavior.

## Train the Victims—Train the Bullies

Schools can implement programs that train students who have been or may become victims of bullying behavior in how to be assertive in ways that do not involve violence. These programs can increase the students' appreciation of their own dignity and self-worth and can make them seem more valuable in the eyes of their classmates. These programs often include role-playing, class discussions, and individual counseling.

Thorough prevention of the problem, however, is not likely without programs that help bullies learn new skills to control their aggressive urges and to meet their need to assert themselves in positive, prosocial ways. These children may need individual and group counseling to learn new skills for interaction. If they learn to control themselves, they will not feel the need to control and dominate smaller or less powerful children. Interestingly, the bully benefits as much from confidence and assertiveness training as the victim of bullying.

*Thorough prevention of the problem is not likely without programs that help bullies learn new skills to meet their need to assert themselves in positive, prosocial ways.*

In addition to teaching children with a tendency to bully about alternative ways to express themselves, it is also important to provide them with incentives for not engaging in bullying behavior. Pairing a program that disciplines uncooperative behavior with a program that rewards cooperative behavior will provide the highest success rates.

## Involve Parents

Involving the parents can pay big dividends when you address bullying and virtually any other discipline problem. Parents of the victims should be informed of the problem and involved in the programs which teach their children how to stand up for themselves with confidence. The likelihood of success in changing the bully is greatly increased if the parents of the bully are willing to become involved in the training program. However, do not give up on efforts to change the bully's behavior just because the parents' response may be, "I've taught him to stick up for himself, and he should hit the other kids if they don't do what he tells them," or, more frighteningly, "I'll whip the tar out of that kid when I get him home." If anything, these attitudes show that the child probably does not know he or she can express emotions in more positive ways. Show the bully another way, and provide him or her with an encouraging, but firm, environment in which to choose that way.

## Chapter 8-4

# Defusing a Crisis Situation

At least 282,000 students are physically attacked and over 100,000 teachers are assaulted each year. If your teachers have not faced a criminal assault on themselves, their students, or their colleagues, or have not witnessed two or more students engaged in mutual combat, then they are living on borrowed time. As the front line combat troops in our war against educational violence, classroom teachers need to know effective methods for defusing or disrupting violent student behavior. Classroom teachers also need to understand what they can do legally when they are forced to resist violent acts in self-defense or the defense of another.

## Strategies for Preventing Violence

The expression "in the heat of the battle" means just that—the teacher becomes angry and loses control of the situation. Do not place yourself in this very desperate state. Here are some steps to consider before you ever get into a combative or coercive situation with a student:

**Complete training.** Your school should have a training program for all of its teachers that addresses situations where the use of physical force may be needed. This training should outline the procedures teachers should follow and the techniques teachers could use to restrain or subdue students who become violent.

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Form Mutual Alliances

**Form mutual alliances.** If the school offers no support, teachers should make alliances to aid each other. Just a simple "If you need me in an emergency, I am here for you" gives support and assurance in time of crisis.

Be Calm

**Be calm.** In a crisis situation, appearing calm is almost as useful as being calm, so do not hesitate to fake a calm, kind, and caring demeanor. Looking or acting excited, frightened, or angry will only fuel an already-raging fire. Use a relaxed and nonjudgmental approach to draw the oxygen away from the student's emotional flames. However, avoiding confrontational language or actions does not mean that you act like a wimp. The appearance of fear, indecisiveness, or weakness is more likely to embolden the angry student than it is to calm him or her.

When you are faced with a potentially violent situation, use behaviors that can help calm the person in crisis. If you do not help the student handle his or her crisis, it will become your crisis, too.

Observe

**Actively observe the person.** Positive interaction is unlikely if the individual is engaging in bizarre behavior or speech, appears to be under the influence of alcohol or drugs, or appears to be hallucinating. Simply listen and try to be nonthreatening until help arrives.

Listen

**Actively listen to the person:**

1. Focus on the person before dealing with the situation. Maintain eye contact and an open, nonconfrontational posture.
2. Let the person know that you are willing to help him or her minimize or solve the problem and that you acknowledge his or her emotions.
3. Do not act defensively and do not start blaming the combative individual or explaining why the school is right. Do not become angry and lash out. There will be time to sort out what is right and wrong once the situation is stabilized.

4. Speak clearly, softly, and slowly. When a person is on an adrenalin rush, you need to help him or her calm down, not become more excited.
5. If possible, separate the excited person from the audience. You do not need onlookers becoming involved or excited, and you do not need the student in crisis to feed off of or play to the crowd.

If needed, remove your students from the classroom. Have a contingency plan for letting your students leave the classroom so you can focus your attention entirely on the student in crisis. Unless the student has a serious psychological problem, isolating him or her can be a powerful first step toward defusing the crisis. There are very few students or situations that a teacher cannot handle on an individual basis.

Determine What Triggered the Crisis

**Determine what triggered the crisis:**

1. Ask questions that address the current situation. This strategy puts you in control while letting the student do most of the talking.
2. Paraphrase the student's answers to let him or her know that you heard and understood.
3. Identify the problem and focus on what happened and what needs may be expressed in the current situation. Do not worry about why the situation developed. There will be time to consider that later.
4. Determine what is important to the student and try to determine what he or she thinks would help solve the problem.
5. Try to be helpful, but do not lie. Telling the individual that you will work with him or her to handle the problem is appropriate. Telling the student that everything will be fine and that there will be no consequences will only lead the student to suspect you are lying about everything else as well.
6. Establish boundaries. Try to keep the conversation focused on the crisis, and ignore comments that do not address the problem. Do not reward name-calling or verbal aggression by taking the "bait" and

responding in kind. Calmly explain the consequences of continued aggressive behavior.

7. Try to prevent the student from getting between you and an exit. Do not turn your back to the person, and try to maintain a distance of five to ten feet—close enough to communicate but far enough away that he or she would have to move to reach you.
8. Give the student a way out. Do not box the student in with words or create a major loss of face by taunting the student or using sarcasm when you speak to him or her.

When the Student Threatens or Tries to Steal

**When the student threatens or tries to steal:**

1. Give the person what he or she wants. Your purse or wallet or the school's VCR can be replaced—your life cannot.
2. Do not play John Wayne. If the assailant will leave without hurting you or anyone else, let him or her go. It is better to let the assailant escape than to risk having the assailant attack you or someone else. You are also likely to be able to give a better description if you are not injured.
3. Unless the person's demands will cause you or someone else physical harm, go along with them until he or she leaves or you can safely escape.
4. Do not argue with the assailant. Do not belittle or make fun of him or her.
5. Do not make any sudden moves that might startle or frighten the person, and do not scream or call for help unless you know help is close by.
6. Do not leave a place in which other people are near or may appear soon. Try to avoid going with the assailant to a location that is more isolated. Do not get in a vehicle with the person who is threatening you. The probability of your being seriously injured, sexually assaulted, or killed are much higher if the criminal can take you to a location that is free from possible discovery and interruption.

*Do not play John Wayne. If the assailant will leave without hurting you or anyone else, let him or her go.*

## Chapter
## 8-5

# Reasonable Force

Despite all of your best efforts to defuse a crisis and prevent violence, you may be faced with a situation that could involve your use of physical force on a student. It is imperative that you be trained in what you can and cannot do legally. Before we provide strategies for exerting reasonable force in crisis situations, it is important to stress what reasonable force is not.

## Reasonable force is not . . .

- Corporal punishment. Reasonable force is never used to deter future misconduct or punish past misconduct.
- Used with the intent of causing pain. Swatting students on the buttocks, pulling their hair or their ears, or rapping them on the head or hands because they disobeyed or angered the teacher are, at their "best," examples of ineffective corporal punishment and, at their worst, felony assault on a child.
- Gentle guiding or attention-getting contact. While such contact may be inadvisable in many situations, a mild touch to a student's hand or shoulder is not a reasonable use of force.

## Reasonable force is . . .

- The physical force or restraint used in situations where the teacher believes he or she must become physically involved to prevent an ongoing, dangerous, or potentially dangerous act from harming or further harming the teacher, a student, or a staff member.

*Reasonable force can be legally used only to protect the health and safety of people.*

Reasonable force can be legally used only to protect the health and safety of people. Because of this, we recommend against using force to prevent theft or vandalism. Property is more easily replaced or repaired than are people. Ensuring the safety of your staff is more important than avoiding property damage. However, using reasonable force to restrain a student who threatens to ignite a five-gallon can of gasoline with a lighter could result in protection of life and is probably warranted.

## Reasonable Force in Action

The legal Doctrine of Reasonable Force allows the use of the type and amount of force that is reasonable in the situation. Rather than leave you with this circular legal definition, however, let us explore what the courts have said about situations in which teachers may, or even should, use force against a student.

- Physical force may not be used to restrict routine or non-dangerous misconduct or to get a student's attention.
- It is not appropriate for a classroom teacher to use force to remove a disruptive but nonviolent student. A teacher does not improve classroom discipline by trying to drag a recalcitrant student out of the room. Instead, the teacher should send for a member of the administration and let that person or the police handle the situation.
- If possible, have the rest of the students leave the classroom or area and deny the disruptive student his or her audience.
- If a high school student tells you she is leaving school and you cannot stop her, do not try to physically prevent her from leaving. The probability of harm to you or the student is much greater if you use force than if you let the student go.

### Circumstances Can Determine Need for Force

**The need for the use of force can change if the circumstances are different.** The primary question when considering the use of reasonable force is always, "What has the lowest potential for serious harm, using force or not using force?" If a kindergarten student becomes upset and starts to run toward a busy street, a teacher is obligated to use a reasonable degree of force to prevent the child from being hurt. This case would probably require chasing down and restraining the child.

A more difficult question would involve an older and larger child, who is mentally disabled. The child is large enough that an attempt to restrain him or her could harm the student or the staff member, with the possibility of the parents claiming that the school was negligent in unnecessarily restraining and harming their child. However, because the child is mentally disabled, he or she is likely to be injured if allowed to leave the school grounds without proper supervision. If the student is allowed to leave without restraint, and is injured, the parents can charge the school and staff for negligence for failing to restrain their child and protect the child from a dangerous situation.

### Force to Eliminate Present Danger

**A teacher is limited to the force needed to eliminate the present danger** to the teacher, the student in crisis, other students, or other staff members. If a six-foot, 250-pound football player is trying to stab another child, it would be reasonable force to pick up a baseball bat and use it on the football player, even if it shatters his arm and permanently cripples him. However, it would be excessive force if a teacher saw two first-graders wrestling in the schoolyard and threw both of them to the ground to prevent their hurting each other.

### Force during an Assault

**Force can be used by a school employee against a student when that student is engaged in an actual assault or other physically harmful behavior.** Force is permissible to prevent actual injury or highly offensive bodily contact. Again, the degree of force the teacher can use depends on the degree of harm that is being prevented. While it is insubordinate, disrespectful, disruptive, and unpleasant to have a student shake his finger in your face, this act does not justify your grabbing his hand and twisting his arm behind his back. However, if a student were to grab or fondle a teacher in a private area, a more emphatic physical response by the teacher would be expected and reasonable.

## Doctrine of Reasonable Force

*This doctrine considers four factors:*

- *The imminence of the threat*
- *Relative size, age, and strength of the parties*
- *Seriousness of the threat and past conduct of the threatening person*
- *The Aggressor Doctrine*

Depending on the circumstances, threats can justify the use of force. The Doctrine of Reasonable Force governs whether a threat by a student to harm a teacher or a fellow student can justify a violent response. The application of this doctrine considers the four factors of the imminence of the threat; the relative size, age, and strength of the parties; the seriousness of the threat and past conduct of the threatening person; and the Aggressor Doctrine.

The most important factor is the imminence of the threat. A student who threatens to hunt you down and kill you in six years is engaging in inappropriate and even criminal misconduct. However, a teacher would not be justified in using that threat as the basis for beating the student. While corrective action is necessary, an immediate physical response is not.

### Imminence of Threat

Another example of how the ***imminence of the threat*** can affect your options would be a student with a knife who is standing 50 feet from the closest person and is screaming that she will kill anyone who comes near. From that distance, she is not an immediate threat to anyone. Rather than attempting to disarm her, thereby risking serious harm to yourself, it would be wiser and more legally sound to have all students and nonessential personnel leave the area and wait for the police to arrive. There is no need to use force, unless she suddenly charges someone.

### Size, Age, and Strength

Another factor to be considered is the ***relative size, age, and strength of the parties.*** A six-year-old, 60-pound dynamo may intend in a fit of temper to do serious bodily harm to a six-foot, 25-year-old physical education teacher. Under the circumstances, however, it would not be appropriate for the teacher to punch out the first-grader. But if a six-foot five-inch, 250-pound, 16-year-old threatens a five-foot two-inch, 120-pound, 60-year-old teacher, a great deal of force could be justified in the defense of the teacher.

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If two kindergarteners are rolling on the ground in an angry wrestling match, the potential for serious harm is so low that force beyond picking them up and separating them is unlikely to be reasonable. However, if eight high school students attack one high school student, significant force may be reasonable in an effort to rescue the victim.

### Seriousness and Past Conduct

The ***seriousness of the threat*** and the ***past conduct and reputation of the attacker*** are also important factors to consider. If a very large and very angry student with a history of fighting on campus and a reputation as a gang member threatens to beat a teacher, then a great deal of force could be justified as the student begins his assault. Conversely, if a small female student threatens to hit a teacher, slapping the student would not be an acceptable response to her disrespect. A less physical response should be used to correct that kind of unacceptable threat.

### Aggressor Doctrine

A final element of the Doctrine of Reasonable Force is the ***Aggressor Doctrine.*** If an assailant stops his attack and withdraws and is no longer a threat, the victim is not legally entitled to finish the fight or even retaliate. For example, if a student strikes a teacher in the face and then backs up, drops his hands, and says that he is done and does not want to fight any more, the teacher would not be justified in responding to the assault with a punch of his own. Instead, the teacher's remedy is in the criminal law, school discipline, and/or civil law. Responding with force after the student has withdrawn will only create trouble for the teacher and detract from the student's wrongdoing.

Like many legal theories, the Doctrine of Reasonable Force puts the classroom teacher between a rock and a hard place. On the one hand, teachers who respond to situations with excessive and unreasonable force can place their jobs in jeopardy and leave themselves and their schools open to civil liability. On the other hand, if teachers fail to respond in a situation where physical harm is imminent, they risk injury to themselves, injury to fellow staff and students, liability for their school for failing to provide a safe and secure environment, and guilt for harm which could have been prevented. When faced with a volatile situation, the classroom teacher must answer two questions:

1. If I do not use physical force, is there real harm or risk of harm to a person?
2. What kind of force would a reasonable educator use in this situation?

Chapter

# 8-6

# Self-Defense

Unless you are very lucky, you may need to protect yourself from a physical attack at some point in your teaching career. Most likely, the attack will be from a student. There is no way that you can emerge from physical contact with a student and be a winner. Even if you are blameless, lawsuits, harassment from the parents, inquiry by the administration, and other unpleasant and career-threatening events can emerge from physical conflict with a student. The best you can hope to do is avoid physical contact in the first place and, if that is not possible, restrain or break from physical contact and seek help. All crisis situations, especially those involving physical contact, should be documented in great detail. The seriousness of such events cannot be overemphasized.

This chapter includes a number of self-defense strategies to be used to avoid physical contact and self-defense techniques to be used when you cannot avoid physical contact. We do not recommend that you try these self-defense techniques in a crisis situation unless you have first completed training in their use. Organizations that offer self-defense training are listed at the end of this chapter.

## When You Can Avoid Physical Contact

If possible, avoid physical confrontation by taking the following steps:

1. Keep your attacker in view until you can move to a place of safety. Your eyes are your first line of defense.

### Caution!

We do not recommend that you try these self-defense techniques in a crisis situation unless you have first completed training in their use.

2. Move to a place of safety. Do not retreat to a corner or the back of the room. You want out. Head for the door.

3. Do not turn your back. Move away in a half turn, facing your attacker. This gives you good balance and the ability to see to the front and the back. Once at a safe distance, seek help.

4. Do not engage in a struggle with the student. Your goal is to disengage and escape.

5. However, if the student needs to be restrained, get help. Get the principal, get the police, get some teachers, especially of the same sex as the student. Try not to put yourself in that vulnerable position where you are one-on-one with a student with no adult witnesses and no help in sight.

6. If you have to use force, use proper self-defense techniques. Your only goal is to escape and to prevent injury to yourself and others.

## When You Cannot Avoid Physical Contact

If, in spite of your best efforts, you are attacked, or if you are attacked without warning, follow these general guidelines:

**Remember the other students in your class.** You must be mindful to take steps that ensure their safety as well as your own.

**Try to escape.** If you are not being physically held, retreat to safety.

**Use minimal force.** It is not your job nor is it in your best interest to administer any physical punishment. Seek only to repel an attacker.

**Restrain your attacker**. If you cannot break contact, use the minimum counterforce necessary to restrain the student's behavior. Get help immediately.

### Caution!

We do not recommend that you try these self-defense techniques in a crisis situation unless you have first completed training in their use.

**Minimize duration of restraint.** Apply restraint no longer than necessary. There is no need to drag the student about if he or she has calmed down.

**Respond to dire circumstances.** If the attack is **savage** and **life-threatening**, you do have a right to defend yourself. In dire circumstances, you may need to defend yourself by striking the assailant in one of the following five areas:

1. The eyes—sticking fingers in an attacker's eyes will blind him or her.
2. The shins—a hard kick in the shins will cause the attacker extreme pain.
3. The groin—strike either with a kick, a knee, or a punch. One kick will do.
4. The knee—a hard kick to the side of the knee will cripple an attacker.
5. The neck—a punch or chop to the front of the neck aimed at the windpipe area can bring a sudden halt to the hostilities.

You should be in dire, life-threatening circumstances before using any of these self-defense techniques.

## Self-Defense Techniques

A teacher is allowed to use reasonable force to protect him- or herself, a fellow staff member, or a student. From a legal perspective, however, you must not use force in an unreasonable manner. Instead, you can use only "reasonable force"—the minimum amount of force needed to protect yourself or another threatened individual. In some situations, failing to use reasonable force may increase the likelihood of greater physical harm to yourself or others. The following basic self-defense techniques are designed to help you use reasonable force to defend yourself and disengage from physical contact so that you can get help.

*You can use only "reasonable force"—the minimum amount of force needed to protect yourself or another threatened individual.*

We strongly recommend that you practice these techniques before using them in a crisis situation. With adequate training and practice, you will be able to use these techniques with the confidence needed to defend yourself or others forcefully and effectively. One of the worst things you can do is to unsuccessfully attempt a self-defense technique and escalate the situation without escaping from it.

For this reason, consider reserving an in-service meeting for self-defense training and practice. Invite a professional self-defense trainer to provide demonstrations of techniques and guide your staff's efforts to master them. Suggestions of organizations that provide self-defense training appear at the end of the chapter.

The Biter

**The biter.** If you are bitten during an attack, and the biter does not release:

1. Move toward the attacker. If you pull away, a hunk of your flesh may also pull away, so move forward.
2. Pinch the attacker's nose. This will make the attacker open his or her mouth to breathe. When this happens, escape.
3. Retreat and seek help.

The Hair Puller

**The hair puller.** If the attacker has grabbed a handful of your hair and will not release:

1. Move toward the attacker.
2. Lace your fingers together on top of the attacker's hand and press down hard. (If the attacker uses two hands, each holding a hank of hair, then place one of your hands firmly over each of his.)
3. Move forward slightly and turn your body in a complete circle. Since the attacker's hand is pinned to your head, his grip must release. His hand cannot make a full turn, and your upper body is much stronger than his grip.
4. When the grip releases, retreat immediately. Retreat sideways to maintain visual contact with the attacker.
5. Seek help.

### Caution!

We do not recommend that you try these self-defense techniques in a crisis situation unless you have first completed training in their use.

The Attack from Behind

**The attack from behind.** If the attacker comes from behind:

1. Reach back and put the pinky edge of your palm under the attacker's nose and push up.
2. Step back hard on one of the attacker's feet.
3. Retreat and seek help.

If you fear serious bodily harm:

1. Strike back at the attacker's stomach with an elbow.
2. Step slightly to the side and swing your fist back into the attacker's groin area.
3. Retreat and seek help.

The Kicker

**The kicker.** Kickers are problematic. You should simply be able to move away from the attacker, make your retreat, and seek help. But the classroom is a crowded space, full of desks, chairs, and tables. If you are unable to retreat immediately, try the side step:

1. Turn your body so that your right side faces the kicker.
2. Raise your right knee and kick backwards, catching the inside of the attacker's kicking leg with your heel and pushing the attacker sideways and off balance.
3. Escape and seek help.

## Restraint

Instead of parrying an attack, situations involving physical contact can often call for applying restraint to unruly students to prevent them from harming themselves and others.

The Arm Restraint

**The arm restraint.** This is an easy and comfortable hold which restrains a student without harming him or her. This hold should be applied to a student who is not struggling or thrashing about.

1. Stand to the side of the student.

2. Use one hand to grasp the student just above the elbow.
3. Use the other hand to grasp the student's wrist.
4. Send for help.

### The Chair Wrap

**The chair wrap.** Use this technique to restrain a small student from getting out of a chair and harming him- or herself or others.

1. Move behind the student's chair.
2. Kneel down.
3. With your left hand, push the student's left arm to his right side and grab it at the wrist with your right hand.
4. With your left hand, take the student's right wrist and pull his right arm across his body.
5. Keep your head back to avoid being butted by the back of the student's head.
6. Send for help.

### The Standing Restraint

**The standing restraint.** This restraint is similar to the seated restraint except that the student must be moved into the hold.

1. Stand to the right side of the student.
2. Take hold of the student's right wrist with your right hand.
3. Swing your right leg 90 degrees to the right side and pull the student toward you.
4. Pivot with the left foot to a position behind the student.
5. With your right hand, push the student's right arm to his left side in front of the student and grab it at the wrist with your left hand.
6. With your right hand, take the student's left wrist and pull the left arm in front of the student's body.

### Caution!

We do not recommend that you try these self-defense techniques in a crisis situation unless you have first completed training in their use.

7. Keep your head back to avoid being butted by the back of the student's head.
8. Send for help.

Carrying a Restrained Student

**Carrying a restrained student.** From the standing restraint position:

1. Approach the restrained student from behind to avoid being kicked.
2. The person restraining the student should tip the student backwards by bending his or her leg forward slightly and leaning the student back.
3. A second teacher should approach from the rear on the side of the teacher's leg that supports the student.
4. The second teacher reaches one arm behind the student's knees and one arm over the top.
5. The second teacher interlaces his fingers so that his arms now form a loop around the student's knees.
6. Lift the student's legs, keeping his weight shifted into the restraining teacher's upper body.

The Two-Person Hold

**The two-person hold.** If one teacher has the student in a standing restraint, a second teacher can:

1. Approach from behind the student and teacher.
2. Take one of the student's wrists and stand so that the teacher is shoulder to shoulder with the restraining teacher.
3. Both teachers may now use their free hands to grasp the student's belt or waistband and lift him to his toes.

## Organizations That Teach Self-Defense

The self-defense techniques described above are just a few of the basic strategies you might learn in a self-defense class. Self-defense techniques are most effective when used with confidence, and confidence comes only with training and practice. We strongly recommend that you invite a professional self-defense trainer to an in-service meeting to demonstrate these and other techniques and to guide your staff's efforts to master them. You may find qualified trainers through your local YMCA or YWCA; community college, college, or university; or area martial arts instructors.

## Chapter

## 8-7

# Weapons on Campus

Few problems are more potentially dangerous than the presence of weapons on campus. We strongly urge you to develop a zero tolerance weapons policy because of the high risk for serious injury or death and the liability a school may face when a weapon is used on school grounds. This chapter focuses on the importance of developing a written weapons policy and applying search-and-seizure principles to the problem of weapons on campus.

## Weapons Policy

In many areas of school discipline, repeated infractions are handled with increasingly serious levels of discipline. Some offenses, however, are so serious that a single incident may require the most serious penalty of all—expulsion. If a student brings a loaded gun on campus, for example, it would not be effective to have the student attend lunch detention for a week and then return to class. You need to remove that student from the school environment as quickly as possible. He or she poses an immediate danger to others as well as to him- or herself.

**Zero tolerance.** Every school should have a written discipline plan that includes a clear weapons policy. Your weapons policy should be as strict as possible, and you should apply the guidelines and punishments outlined in the policy with scrupulous consistency. You may be tempted to look for mitigating circumstances, but we urge you to resist the temptation. The message that has to be clearly and consistently sent is: "We have zero tolerance for

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weapons in a school setting. If you bring a weapon to school, your punishment will fit the seriousness of the crime."

### Clear, but Reasonable

**Clear, but reasonable.** Although prohibitions against weapons may be absolute, they also must be reasonable. If your policy forbids knives on campus, do you mean all knives? How about a small pocketknife? How do you define "small"? Is a nail file considered a knife? How about a sharpened nail file? The weapons policy should be precise and clear about what is considered a weapon. The policy must also be communicated in writing, in speech, and as often as needed to those who are governed by it.

*The message that has to be clearly and consistently sent is: "We have zero tolerance for weapons in a school setting. If you bring a weapon to school, your punishment will fit the seriousness of the crime."*

We are aware of a recent case where a young woman was suspended for bringing a knife on campus. Further investigation revealed that the knife:

- was commemorative,
- was intended as a birthday gift for her boyfriend,
- was wrapped, and the wrapping had been sealed.

In spite of these special circumstances, the school followed its weapons policy and gave the student a long-term, out-of-school suspension. Her parents appealed the decision to the court, which considered the circumstances and overturned the suspension.

This punishment may have been overturned because the package was sealed, and access to the knife would have been difficult. There may also have been a vagueness in the definition of what constituted a weapon in the school's written policy. This decision, however, does not mean students can bring AK-47s to school as long as they are wrapped and sealed. If anything, the decision stresses the need for weapons policies to be clearly worded and reasonable.

### Ban Replicas

**Ban replicas.** We strongly recommend that as you ban weapons from school in your weapons policy, you also ban realistic replicas of weapons. If a student carries a replica to school, other students will believe it is a real gun and think they have to carry guns as well for self-protection. As a result, one replica can prompt students to bring in real guns, greatly increasing the risk of violence and serious injury or death.

Violating School Rules, Breaking the Law

**Violating school rules, breaking the law.** When a student brings a weapon, such as a gun, on campus, he or she not only violates school rules and regulations, but has in most jurisdictions also violated state law and committed a crime. In response, the school may expel the student and the courts may decide to place the student in detention or on probation. This kind of punishment sends a clear message to other students that bringing weapons to school will not be tolerated by school authorities and will also involve such students in the criminal justice system. When a crime has been committed, call the police. When you discover a student has brought a weapon on campus, always call the police immediately.

Security Guards

**Security guards.** We recommend that security guards do not carry weapons. If you think some protection is necessary, we recommend that guns not be allowed in favor of less lethal weapons.

## Search and Seizure

In nearly any situation, a teacher should not conduct a search for a weapon on his or her own. Instead, you should notify the administration and let an administrator conduct the search or help you conduct the search. Before you can search for contraband, you have to have a reasonable suspicion that a particular student has the weapon or other prohibited item and a reasonable suspicion that the weapon or prohibited item is located where you are searching. If, for example, the students Hank, Joe, and Jack are seen walking around campus and Jack has a gun, you can certainly search Jack. If this search yields nothing, you could probably also search Hank and Joe, given the circumstances. But if you are told that one of the 30 students on the playground has a firearm and you have no further information, you do not have any reason to believe that a particular student has done anything wrong, and you would not be legally permitted to search the group. The only time you can perform a general search is during an extremely serious situation, such as a bomb scare.

Metal Detectors

**Metal detectors.** The use of metal detectors in the school environment is becoming commonplace in some districts. Metal detectors are one of the least intrusive ways a school can search its students for weapons. These devices are needed in school districts with high levels of violence because they discourage children from bringing weapons to school.

Obviously, metal detectors are effective only when they are used on closed campuses. There has to be an established entrance area that all students must pass through before they enter the school. If students leave the building for any reason, they can re-enter only through that area.

The procedure can be very time-consuming if you have a school with a large enrollment and have to check thousands of students each day. However, the time and money required to buy and use metal detectors is well spent if they prevent even one stabbing or shooting each year.

Where violence is less prevalent, the judicious use of one or two metal detecting wands may be a viable alternative to using a metal detector. If an administrator thinks that a student may have a weapon because a teacher or another student reported the possibility, the wand could be used to do a nonintrusive check to see if there is sufficient metal on the student to warrant a more complete search.

Pat-Down Searches

**Pat-down searches.** We are very reluctant to recommend that you consider searches of this nature. Law enforcement officials are trained to do pat-down searches—teachers are not. It is one thing to ask a student to empty her pockets. It is much more intrusive to have a teacher touching parts of a student's body in search of contraband.

The only time you might even consider a search of this nature is if you have good reason to believe that the student has a weapon on his or her person. Your failure to quickly find and secure this weapon puts you and those around you in danger. In this case, balancing the risk of violence with the intrusiveness of the search may yield a reasonable cause to conduct a pat-down search. Even when such a search seems justified, we strongly urge you to ask a member of the administration to perform the search.

Rumors

**Rumors.** What if there is a rumor that one of the male students has stashed a handgun in his locker? Can a member of the administration open the lockers of all male students and look for the handgun? Absolutely not. The rumor of a handgun is not specific enough to invade the privacy of all the male students on campus. The test of reasonableness says that in order to search, you need a reasonable cause to believe that an individual has committed a crime or violation of a school rule and a reasonable cause to believe that there is evidence of that crime or violation of a school rule to be found through the search that is being considered. It may be logical to think that you will find some kind of contraband if you open all the lockers. Although this may be true, the law does not allow you to do this. This is called going on a fishing expedition. The law will allow you to fish, but you have to know the name of the fish and be reasonably sure he's the one who swallowed your ring. Unless you have a license for a particular fish, you may have to release any other fish you catch.

Confiscating Weapons

**Confiscating weapons.** A bomb threat is one of the few threats to safety that can justify a search of all student lockers. In such a comprehensive search, you may find other contraband, including weapons. Can you confiscate these materials even if they were not the basis for the search? Absolutely. You should also call the police, apprise them of the situation, and hand over the contraband. Not doing so could open you and your school to liability for knowing of the contraband, especially if it is a weapon, but failing to take steps to secure and dispose of it safely. Because the search for a bomb was reasonable, any other items of contraband found may be used in a criminal charge or disciplinary hearing against a student.

*A bomb threat is one of the few threats to safety that can justify a search of all student lockers.*

Conversely, if you conduct an unreasonable search for a suspected rifle in a purse, you will probably not be able to use the marijuana you find there as evidence in a criminal or student disciplinary hearing. You had no reasonable expectation of finding a rifle in a 10-inch-long purse. If the underlying search is not reasonable, the unrelated contraband will not be admissible as evidence.

### Bringing in the Police

**Bringing in the police.** There are problems that arise from bringing in the police too soon. If you involve them in the early stages of an investigation, the standard for performing a search becomes the police's standard of probable cause, not the less-restrictive educator's standard of reasonable cause. On the other hand, if the problem is a bomb threat or someone running around with a loaded firearm, you should involve the police as soon as possible.

### Liability for Failing to Search

**Liability for failing to search.** A school can be liable for failing to conduct a needed search. If the school has reasonable cause to believe that a particular student has a gun on campus and does nothing about the situation, it can be liable for negligence. If the student uses the gun to kill another student, the victim's parents could sue the school on the grounds of negligence because the district did nothing. Punitive damages can also be assessed if the judge and jury determine that there was gross negligence on the part of the school for failing to conduct a search when doing so might have reasonably secured the gun and prevented the crime.

Failing to search for weapons can also affect the operation of the school. If searches are not conducted when needed, and students believe that it is easy to bring guns onto campus because the chance of discovery is slight, they will feel free to do so. When some students realize others have weapons on campus, they will start carrying weapons for self-defense, creating a downward spiral in school safety.

# Case Study

## Weapons as Self-Defense

**I am concerned about the increased violence in my school. Is it advisable for me to carry a weapon or one of the pepper-spray devices for self-defense?**

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We strongly advise all school personnel against possessing a weapon, under any circumstances, while on school grounds or while participating in any school-sponsored activity. The only exceptions are police officers assigned to or employed by the schools and possibly a specially authorized and trained school security guard. There are a number of compelling legal and practical reasons for this admonition.

First and most important, in most circumstances, a teacher will be committing a criminal act if he or she possesses a weapon, particularly a gun, while on school grounds or while engaged in a school-sponsored activity. States generally have statutes which prohibit bringing a weapon on campus. Most schools also have policies that strictly prohibit bringing a weapon on campus. Seldom, if ever, do these statutes or policies make exceptions for teachers or other educators, nor should they. Teachers who possess a gun or other weapon on school grounds face criminal prosecution and conviction, fine and imprisonment, termination of their employment or other school discipline, and possible loss of their teaching certificate. Courts in some jurisdictions have upheld the termination of a teacher's employment based on the teacher forgetting to remove a hunting rifle in his car before parking it on school grounds.

Second, the presence of a weapon, even in the possession of an adult teacher, greatly increases the possibility that someone will be injured or killed with it. Weapons, particularly firearms, are inherently dangerous instruments and carry the potential for serious harm, especially to innocent bystanders. Even though target practice can be recreational, and shooting is a recognized Olympic athletic event, the primary function of weapons is to threaten, intimidate, hurt, or kill someone or something. Bringing a weapon to school will not discourage someone else from using his or her weapon. It will only make the school environment more dangerous.

Many self-defense experts do not recommend that the average person use a weapon as a means of self-defense. Unless you have been trained in how and when to use a weapon, there is a very real possibility that an attacker could take your weapon away and use it against you. One gun in the hands of a hostile or frightened student or a criminal is one gun too many. A second gun greatly increases the probability that one or both weapons will be fired and that someone will be injured or killed.

If a teacher carries a weapon or has one in her purse or in his desk, there is a very real possibility that an inquisitive or even a malicious student could find, take, and use the weapon. All too often, a child will accidentally kill a playmate or a sibling while playing with a family gun. Even high school students can behave in an incredibly foolish manner when they have access to a weapon.

In addition, many people have been killed or wounded by "unloaded" guns. Firearms which are not cocked and have their safeties on have discharged. If a gun is dropped, it can discharge. If a gun in a purse, backpack, or pocket is hit or brushed in the wrong way, it can discharge. And when a gun is discharged, the bullet travels in a straight line and will injure or kill anyone who is in that line of fire.

The third reason not to possess a weapon on campus is that the teacher and the school both face serious potential civil liability. Imagine for a moment how a jury might respond to a lawsuit against you and your school by the parents of a child who was accidentally shot and killed with the gun you had in your desk for self-defense. There are no good reasons for school personnel to bring weapons on campus or to school-sponsored activities for self-defense.

### What is a weapon?

This question has both a practical and legal answer. When we strongly recommend that no educator possess a weapon while engaged in professional duties or on school grounds, we mean those items that are specifically intended or commonly used as instruments of potential harm. Any firearm constitutes a weapon—even BB and pellet guns. A replica or realistic toy gun is also considered to be a weapon and can be very dangerous to the person using it. Criminal statutes generally focus on the reasonable reaction of the person facing the toy. If it appears to be real, then it is considered to be a weapon in claims of armed robbery or aggravated assault.

Knives are also weapons, based on the circumstances. A kitchen knife in a kitchen is not considered a weapon unless it is used as one. However, a kitchen knife hidden in a purse or backpack could constitute a concealed weapon. A kitchen knife in a school desk could be used to cut apples, but it also could be considered a weapon. Apples are cut almost as easily by a table knife or even a plastic knife as they are by a sharp kitchen knife, and the table or plastic knife is considerably safer for everyone. A pocket knife with a blade of less than two inches is often not considered a weapon, although it is important to check your school policy and local laws on this issue.

A baseball bat in a physical education office would not be treated as a weapon unless it was used as one. A baseball bat in a math classroom would be much more difficult to explain and justify. Consider your reason for having the item on your person or in your room. If it is for protection, it would likely be considered a weapon. If it is a legitimate part of your teaching tools, it will not be considered a weapon unless it is used as one. A hammer or file in a shop class is a teaching tool. The same hammer or file in a library is questionable unless there is a legitimate reason for its presence.

We also recommend against teachers carrying pepper spray or tear gas canisters while on school grounds and/or engaged in professional duties. These devices are almost certainly a violation of your school's policies and carry the same potential for being acquired by students, accidentally discharging, or being taken away and used against you in an attack.

### What about the personal alert or noise-making devices?

There are a number of personal security noise-making devices that serve to attract immediate attention when they are triggered. These noisemakers or panic buttons can be very useful. They cannot hurt anyone if they go off by accident; they cannot hurt you if they are taken away from you; and they cannot create any criminal, civil, or job liability if used responsibly. People who are engaged in criminal conduct do not like attention. They do not like people looking at them and noticing what they are doing. These type of noise-making devices can be very useful in convincing a potential assailant to leave you alone. In deciding when to use these devices, however, you should consider whether your assailant appears to be chemically or mentally impaired or so nervous that he is likely to panic and make a bad decision if you sound the alarm. If these devices are not prohibited by your administration, we recommend their use as a safe and inexpensive self-defense strategy. You should, however, keep close watch on these devices because some students will be tempted to "borrow" them and trigger them in the middle of a social studies test.

### What about high school ROTC or police science classes?

Many high school ROTC and police science classes teach the theories and skills of military and police science, without any weapons training. However, if firearms training is a legitimate part of this curriculum, it should never occur on school grounds, and the weapons used in these programs should never be brought onto campus, even for demonstration purposes. If firearms familiarization or training is part of the curriculum, it can be conducted only on an authorized military or police firing range under the direct supervision of a certified range master. The United States military branches have elaborate safety rules and practices and strict geographical limitations when they have adults engage in live-fire exercises. To use any less formal or restricted a procedure for students who are minors is to invite disaster. ROTC drill teams may drill with rifles. Those used in the drill practices, competitions, and parades, etc., should be nonworking replicas and should be kept under the strict and constant control, supervision, and responsibility of the military science instructors. Clearly, safety concerns prohibit drill exercises with bayonets.

### What about bringing weapons or replicas to school as a visual aid for a history lesson?

Suppose that you are a history teacher and your great-grandfather fought in the Civil War. Wouldn't it be an interesting and attention-getting device if you brought his pistol and sword to class to show the students? The educational answer would probably be yes. The legal and practical advice is do not do it. The legal risks are simply too great to justify the possible benefit. If you still think it is a good idea, secure written, detailed permission from your administrator and have your administrator accompany you onto and off of campus while you have the weapons. The same advice applies if you want to bring in a replica M-16 for a lesson on Vietnam or a battle-ax for a lesson on knights and the middle ages.

# PART 9

# Life Away from School

Chapter 9-1 Abuse and Neglect

9-2 Confidentiality

9-3 Applications

## Chapter

## 9-1

# Abuse and Neglect

Although most of your students' life experiences take place away from school, they have a direct impact on the students' behavior and performance at school. Beneficial experiences help your students excel. Harmful experiences hinder your students' development and may even threaten their lives. Because of your unique position to observe children and be taken into their confidence, you have legal obligations to report information that may prevent a child from coming to harm or may stop an abusive, neglectful, or otherwise dangerous situation.

## Understanding Abuse and Neglect

As a society, we have determined that parents have obligations toward their children. These obligations center around the requirements that parents provide, to the best of their ability, for the physical health, safety, and welfare of their children and that parents must not, by intent or negligence, do things that are harmful to their children or that create an environment of potential harm. Children who lack a caretaker who meets these requirements are considered to be abused or neglected.

Children can be abused physically, sexually, and/or emotionally. Any abuse can severely limit the life and educational opportunities available to a child. Physical abuse may include beatings or even physical torture. Most sexual abuse is inflicted by family members, surrogate family members, friends of the family, or someone in a position of authority and trust. Emotional abuse may include belittling

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a child, telling a child that he or she was not wanted, and saying the child is a failure. Such abuse can severely damage or destroy a child's sense of well-being.

Child neglect is even more prevalent than abusive situations. People do not have to beat, molest, or belittle a child to limit that child's opportunities for a healthy and successful life. Neglect occurs when the parents or guardians fail to provide for the basic necessities of life, such as adequate nutrition, medical care, shelter, and supervision.

Of course, not every bruise on a child's arm is an indication that he or she was been mistreated or that the parents are responsible for the mistreatment. Children can and do fall down in play, trip over rugs, and fight with other children. A student may come to school hungry one morning because he refused to eat or the family overslept and skipped breakfast. The law does not require parents and guardians to ensure that nothing bad or unpleasant happens in a child's life. The law does prohibit parents from abusing their child, allowing their child to be abused, or failing to make reasonable efforts to provide for their child's needs.

*As an educator, you need to look for patterns which may indicate abuse or neglect or significant evidence of a single, serious incident.*

As an educator, you need to look for patterns which may indicate abuse or neglect or significant evidence of a single, serious incident. A regular pattern of bruises, scrapes, or broken bones can be evidence of possible neglect, particularly if these incidents only occur at home and the child appears to be neither particularly clumsy nor adventurous at school. Reasonable cause for concern can also be given if a child regularly comes to school in clothing that is not warm enough or does not offer protection from snow, rain, or other elements of the weather. A small child who suddenly shows an inappropriate interest in sexual matters and has knowledge about sexual activities that is beyond his or her years may be the victim of sexual abuse. In addition, a student's direct or indirect statements can lead to a reasonable suspicion of abuse or neglect.

Only on very rare occasions will persons who have been abusing and/or neglecting a child turn themselves over to the authorities and seek help for the child and themselves. Most victims of abuse and neglect need the intervention of someone outside of the family before the abuse or neglect can be recognized and addressed. That someone could be you.

## Reporting Suspected Abuse

Teachers, administrators, and other school employees are in a position to see the outward indicators of abuse or neglect. You see children on a regular basis and can notice a pattern of repeated bruising or injuries, clothing that is inadequate for the weather, or signs of hunger or malnutrition. You may also hear from children as they turn to you in trust with cries for help and revelations of family abuse.

A Legal Obligation

**A legal obligation.** Your special and unique position brings both moral and legal obligations. Everyone who suspects a child of being a victim of abuse or neglect has a moral obligation to report the situation to the law enforcement or social welfare agencies that can investigate it. In virtually every state, professionals who interact with families and children also have a legal obligation to report suspected child abuse or neglect. When a teacher, administrator, or other school employee suspects that a child is the victim of abuse or neglect, he or she is also legally obligated to report the circumstances and conditions that led to the suspicion to either a child welfare agency, such as child protective services, or to the local law enforcement agency.

Failure to make this required report can have disastrous consequences for the child. Without a report, the child remains in a potentially abusive situation. At best, the abuse will not escalate and the child will survive. At worst, the child may die.

Failure to make this required report can also have disastrous legal consequences for the educator. If the abusive situation is real and you do not report your suspicions, you are subject to criminal prosecution. If convicted, you would have a criminal record and could face fines and imprisonment. In addition, failure to comply with reporting statutes can be a legitimate basis for terminating school employment and revoking teaching, administrative, or other educational certificates. You may also face civil liability if litigation is brought on behalf of the child or other family members who were harmed by the employee's failure to report.

Even with this legal obligation, teachers sometimes hesitate to report suspected abuse. They worry that they might be sued by the parents if it turns out that there is no abuse or if no abuse can be proven. State legislatures have recognized this concern and the reluctance it creates. As a result, the statutes that require educators, under penalty of criminal prosecution, to report suspected abuse or neglect also give the educators protection against civil liability for reporting the suspected abuse or neglect. If you report, in good faith, true observations of physical conditions, behaviors, or statements that lead you to suspect that a child is abused or neglected, then you are protected against civil or criminal liability, even if you are mistaken, and no abuse or neglect exists.

Limitations on Reporting

**Limitations on reporting.** Even with such protection, however, there are limitations on what should be reported.

First, do not report something that did not happen. If you report that a student has come to school with a broken arm three times in the last six months, and the child has never had an arm injury of any kind, you could face adverse consequences for the deliberately false report.

Second, do not report in an effort to falsely accuse another person. A report of suspected abuse or neglect that has no factual basis and is deliberately made to discredit another person can result in liability.

Third, do report the evidence that presents itself, but do not include general assumptions about the appearances of the parents. Child abuse and neglect cut across all socioeconomic boundaries. Sexual abuse of children is found among wealthy, college-educated parents. People who are intelligent, well-spoken, and polite toward adults can be abusive toward children. Loving parents may miss the evidence that someone else, close to the child, is abusing the child. Report any observations about a child's physical condition, physical health, behaviors, or statements that led to your suspicions, but let the authorities investigate and form their own conclusions.

School Policy on Reporting

**School policy on reporting.** Every school should have a written policy that covers reporting requirements. Check your school's policy and follow it strictly. If your school does not have a written policy, lobby for the development and implementation of such a policy. Whether or not your school has a policy, you are responsible for knowing the specific reporting requirements in your state. In some states, a school employee can comply by notifying an administrator. In other states, the employee can comply only by notifying a law enforcement or social services agency.

*Whether or not your school has a policy, you are responsible for knowing the specific reporting requirements in your state.*

Whatever the requirements, however, you should always notify the administration about the situation and the reporting steps that you have taken. This allows the school to begin any steps it must take to handle the situation. These steps may include adding educational offerings, providing counseling services, providing transition services if the student is removed from the home, or simply understanding that the student's behavior may be affected by the investigation and any actions taken because of it.

## If You Suspect Abuse

Whatever the source of your concern that a student is being abused or neglected, you need to discuss the concern with the administration and fellow teachers who interact with the child. Determine if others have made the same observations or have the same concerns. We recommend that school personnel contact the various child welfare agencies before there is a problem to make contacts and determine what facilities are available. Have contacts in the local child protective service and/or law enforcement agency whom you can call and ask for advice.

States have either statutory or common-law requirements that educators, medical personnel, day-care workers, and others with responsibilities toward children report suspected abuse or neglect to the child welfare or police agencies. These states also provide immunity from lawsuits for good faith disclosures. If you have reasonable cause to suspect that a child is abused or neglected, *report.*

## Chapter

## 9-2

# Confidentiality

Students can tell you a great deal about their personal lives. They can discuss their suicidal feelings, drug or alcohol abuse, sexual activity, diseases or injuries, and so forth. Students may come to you with a request to talk that includes asking you to promise you will not tell anyone. Your ability to honor such a request is very limited and never exists when failure to disclose the confidence could reasonably lead to harm to the student or another person.

In most circumstances, people are not legally required to keep confidential statements made to them by another person, even if they have promised not to divulge the statement. Indeed, people can be required to disclose confidential statements and may be fined or imprisoned if they refuse to do so. Failure to provide evidence in a criminal investigation or when testifying in court and failure to honor a subpoena can subject you to charges of being in contempt of court or interfering with a police investigation. Failure to report a student's statement that he or she is being sexually abused can also subject you to prosecution under the disclosure statutes discussed in the previous chapter.

Certain professions are partially exempt from the requirement to disclose confidential statements, even during a criminal investigation or a trial. This exemption is called a privilege against testifying. The decision to invoke this privilege belongs to the individual who made the statement, not to the professional to whom the statement was made. Confidences between a client and attorney,

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patient and doctor, and, in some cases, a Catholic and a Catholic priest are granted this exemption.

Even where privileges are recognized by law, however, there are situations in which the law requires the professional to breach the privilege and divulge confidential information. The privilege does not protect a person against disclosure of a criminal act that is planned but not yet committed. The attorney is required to divulge if, in a privileged communication, the client has indicated that he or she intends to murder someone in the future. Likewise, if the patient indicates that he is going to kill his girlfriend, the mental health practitioner has an obligation to notify the potential victim and take other steps to prevent the crime.

As a general rule, educators have no legally recognized privilege against divulging student statements, even those made with the expectation of confidentiality. Unless a privilege is created by legislation or by appellate court decisions, it does not exist. The factor that determines whether a privilege exists is whether it is legally recognized, not the expectations or preferences of the parties to the conversation. A promise of confidentiality does not create a privilege. Both regular and special education teachers lack any privilege against revealing student confidences. Administrators also lack this privilege. And, unless there is a specific legal authority, even school psychologists do not have this privilege.

## Guidelines for Handling Student Confidences

Teachers and administrators do not have a legally recognized privilege regarding their communication with students. If subpoenaed by a court, you would have to divulge information the student provided to you or face contempt of court charges. If questioned by the police, you could face personal criminal liability for refusing to cooperate in an investigation. These instances illustrate your obligation to answer questions asked by a governmental agency.

*If the failure to divulge may result in serious physical harm or death to a student, you must violate the confidence and place the health and life of the student first.*

What are your obligations to volunteer the results of a "confidential" discussion? If the failure to divulge may result in serious physical harm or death to a student, you must violate the confidence and place the health and life of the student first. If the student divulges that he or she has committed a serious crime, you must volunteer the information to law enforcement authorities.

Once you realize that the confidentiality sought by students is not legally yours to give, you can handle student confidences by using the following guidelines.

### Do Not Promise Confidentiality

**Do not promise what you cannot deliver.** We recognize this guideline may place you in a dilemma. If you do not promise confidentiality, the student may not confide in you and seek needed guidance. If you promise confidentiality and break your promise, the student will feel betrayed, and other students will feel that they cannot trust you. Nevertheless, you cannot effectively promise confidentiality from a legal, ethical, or moral position. You can encourage the student to talk to you and assure him or her you will be as discreet as possible with the information provided. But you should also tell him or her that if it is necessary to reveal the information to protect the student, you will have to place the student's needs above his or her preferences.

### Understand Your Obligations to Disclose

**You can be required to disclose any student confessions or statements** if you are interviewed by a law enforcement officer. To do otherwise could subject you to charges of obstruction of justice or interfering with a criminal investigation.

If you are testifying in a criminal or civil trial or an administrative hearing and you are asked about a student's statements to you, when all of the objections are ruled upon and when the judge or hearing officer directs you to answer, you must answer the question.

You do not have to volunteer to testify in a criminal or civil trial or in an administrative hearing, but if you receive a subpoena to the trial or hearing, or an order from the school to attend a school hearing, you must go.

You must disclose information that a student gives you that indicates a danger of prospective injury to another person. If a student tells you in confidence that he will attack another student on Tuesday as revenge for an insult, you must disclose the information to the administration and the police. If the school has knowledge, because of the disclosure, that a particular individual is in danger, that person is also entitled to notification. Legally and professionally, we must take steps to help prevent the injury. These steps begin with appropriate disclosure of the information gained from the student.

You must disclose information that a student gives you that indicates a danger of prospective injury to the student. If the student indicates that he or she is going to hurt himself or is engaged in conduct that will reasonably cause him serious harm, you have a legal and professional obligation to take steps to prevent this injury. These steps start with disclosure of the information to an appropriate person or agency that can help the student.

Know School Policy

**Know your school's policies concerning disclosure of student statements.** If no policies exist or the policies seem incomplete, lobby to create or update them. These policies should include options for handling various types of disclosures and should include a list of the governmental or charitable agencies that could help the students depending on the nature of their problems.

Develop a Poker Face

**Develop a poker face.** Students are going to tell you some pretty shocking things. They may tell you about horrid abuse. They may tell you about their sexual activities. They may tell you that they are mainlining heroin. Do not show shock. Do not condemn the student. While we may be very concerned about the morality of the situation, first and foremost we must focus on how to put that child in contact with the agencies that can help him or her. If a child's mother has been arrested for prostitution or the father for dealing drugs, the child needs to know that you do not think less of him or her just because the family is having problems. If the child is pregnant, she needs prenatal care, not a lecture on the wages of sin. If a child is using illegal drugs, he or she needs treatment and counseling, not condemnation.

Know Available Resources

**Know the resources available for helping students in need.** Know your school's crisis intervention plan. If your school does not have a crisis intervention plan, then lobby to develop one. Know who to contact to secure the information and services your students need. Be prepared for situations that can adversely affect the entire student body. A student suicide or an accident that kills one or more students can trigger a serious crisis for other students in the school. If not properly handled, one suicide can trigger a chain reaction that may lead to another suicide. Have access to outside professionals who can help the students directly and who can consult with faculty and staff.

## Be Flexible

**Be flexible.** If a student is the victim of abuse or neglect, you may need to be more flexible with classroom rules or homework assignments. If a parent goes on a bender and the student spends the night locked in the bathroom protecting younger siblings, the student may not have properly studied for the spelling test. If a student has been molested, he or she may be more prone to acting out in class.

## Document Your Actions

**Document your actions to protect yourself and your school.** If you receive information that a student may be the victim of abuse or neglect or is suicidal, involved in drug or alcohol abuse, or otherwise engaged in conduct that is reasonably likely to cause harm to the student or others, document where, when, and how you received the information. Record the person or agency to which you reported the information and document what that person or agency told you. Provide the information to the school administration and document this action. After you notify the school authorities, check back to verify that they followed through with appropriate, required reporting. Document your efforts. See Part 3 for more information on documentation.

## Chapter 9-3

# Applications

Students can be involved in or considering actions which can bring serious and permanent harm to themselves or others. It is imperative that schools have a policy to handle these hazardous situations. Again, if your school does not have a policy for handling potential suicide, substance abuse, and criminal activity, we urge you to lobby the school to develop such a policy. This chapter takes a closer look at how an educator should respond to a number of serious problems that may occur away from school, including suicide, substance abuse, sexual activity, and criminal activity.

## Suicide

A student may be suicidal for a variety of reasons—depression triggered by stress or grief; other serious emotional conditions; or a problem that seems insurmountable, such as pregnancy, possible HIV infection, pending criminal conviction, or an abusive home life. The student may also be fascinated with the occult and death, or heartbroken over a breakup with his or her one true love.

What should you do if a student comes to you and indicates that he or she is contemplating suicide? First, and most important, believe the student. The old myth that a person talking about committing suicide will not do it is dangerously wrong. Discussing suicide, being preoccupied with death, developing plans, acquiring the means, and attempting suicide are all indicators of a very real, very serious problem. Legally and morally, you owe it to the

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child to breach the confidence and put the child in a position to get help before it is too late. If you do not report the incident, and the student commits suicide, you, the school, and/or the district may be legally liable for negligence.

*The old myth that a person talking about committing suicide will not do it is dangerously wrong.*

Your second step is to realize your limitations and immediately seek help for the student. A student who is contemplating suicide cannot be adequately handled by a classroom teacher, an administrator, or even a school psychologist. Nor is it enough to simply refer the student to a suicide hotline or suggest that he or she see someone about those feelings. This type of situation requires extensive professional training and experience. Seek help for the student immediately. You cannot protect the student, yourself, or your school by making unilateral decisions. If you are a classroom teacher, notify the building administrator. If you are the building administrator, notify the district administrator. If you are the district administrator, seek guidance from the school attorney and other sources that have information about this problem.

If the student is suicidal because of an abusive home situation, the decision as to whether to notify the parents or a child welfare agency first will depend on the circumstances. The more immediate the threat, the more important it is to first move the child into a safe environment by notifying the police, child protective services, or a governmental mental health provider. If the problems appear to involve the child's relationship with the parents, the first concern should be moving the child into an environment where he or she feels safe, regardless of whether or not the parents are at fault. In these circumstances, the parents would be notified after the child has been placed in a safe environment.

Generally, young people who attempt suicide share a common belief that they have no options or control over their lives. A student who shows one or more of the following warning signs, which are based on statistics from the National Center for Health, should prompt educators to seek assistance for that student.

## Suicide Warning Signs

1. Being preoccupied with themes of death or expressing suicidal thoughts. Suicide threats should not be taken lightly, even if they seem to be impulsive statements made during a quarrel.
2. Giving away prized possessions or making a will or other final arrangements.
3. Changes in sleeping patterns—too much or too little.
4. Sudden and extreme changes in eating habits; losing or gaining weight.
5. Withdrawal from friends and family or other major behavior changes.
6. Negative change in school performance (lowered grades, cutting classes, dropping out of activities).
7. Personality changes, such as nervousness, outbursts of anger, or apathy about appearance and health.
8. Use of drugs or alcohol.
9. Recent suicide of friend or relative.
10. Previous suicide attempt.

As mentioned earlier, it is critical that the school provide specialized counseling services if there is a suicide in the school community. The suicide of one student can trigger suicidal thoughts and attempts in other students.

## Substance Abuse

If a student tells you that he or she is drinking, using illegal drugs, or abusing over-the-counter or prescription drugs, you are legally obligated to disclose the information. The manner and timing of that disclosure, however, depends on the immediacy of the threat to the student's health and welfare and the health and welfare of those around him or her. A student confession that he or she took a beer from the refrigerator at home and drank it does not require disclosure. You will want to talk to the student and

*A student confession that he or she took a beer from the refrigerator at home and drank it does not require disclosure.*

try to discourage future alcohol use, but there is no immediate risk that requires disclosure. However, if the student indicates that he or she gets drunk every weekend at a beer bust by the river, or that students drink and then hold drag races, failure to notify police could have potentially deadly consequences.

Use of certain drugs—such as cocaine, heroin, inhalants (paint, glue, gasoline), speed, and uppers and downers—can result in an immediate and fatal reaction. Even if the student survives the substance-impaired state, these chemicals pose future health risks, which include permanent injury or impairment, chronic health problems, and death. Use of such drugs must be divulged, so the student can get treatment. Although marijuana is illegal, the legal obligations to divulge are not as clear unless there is some indication of imminent danger, such as a confession that the student drives while under the influence. When a student confides that he or she uses marijuana, you need to balance the possibility of talking the student into seeking voluntary assistance versus taking the risk of nondisclosure.

Student confessions of the abuse of legal medications carry the same requirements for disclosure. Many legal medications are deadly when abused. Some can cause immediate death or injury, and others can contribute to long-term health problems. Drinking cough medicine or mouthwash for the alcohol content indicates a serious alcohol addiction problem. Taking excessive numbers of diet pills or laxatives indicates a serious eating disorder. However, eating too many sugar-based cough drops can ruin a diet, but is probably not going to have immediate health consequences. Use your common sense and your real-world knowledge. Does a failure to disclose the confidence put the student at risk? If it does, you are obligated to disclose the information.

*Does a failure to disclose the confidence put the student at risk? If it does, you are obligated to disclose the information.*

Alcohol use can also have an immediate risk of death, although fatal alcohol poisoning is rare. Far more common are fatal situations or accidents caused by a student's impaired judgment. A student who drinks poses an immediate threat to his or her health and welfare and the health and welfare of others. Continued abuse of alcohol also poses serious long-term health and welfare risks.

A student who comes to you admitting that he or she is abusing one or more substances is asking you for help. Normally, if a student did not think there was a problem, he or she would not mention the subject to an adult authority figure. A teacher should never become so familiar with his or her students that they feel comfortable bragging about their drug use or comparing the sensations of different highs to the teacher. Students may tell you they do not have a problem and that they do not want anything to be done. Do not believe them—and do not let the student be the one who decides whether treatment is necessary.

## Who Do You Tell?

Once you decide that you need to disclose the confidence to protect the student, who do you tell? The situation will determine what action should be taken and whether the parent or the appropriate welfare agency should be notified first:

- If the student indicates that the parent is supplying the drugs or alcohol, the police or the child protective service should be notified first. A child whose parents provide or allow access to drugs and alcohol is abused and neglected.
- If the student indicates that students will be going to a beer bust at the lake on Saturday and then drag-racing home, the police need to be notified.
- If the student indicates that he or she is concerned about a drug or alcohol problem, the parents need to be notified first, and follow-up referrals need to be made to welfare agencies or directly to the welfare or mental health agency.
- If the student indicates that he or she is currently under the influence of a drug or alcohol, is feeling ill from a drug or alcohol, or intends to use a potentially deadly drug in the near future, an agency that can provide for the student's immediate health needs must be notified.

Deciding who should be notified and when are decisions that are too serious to be made unilaterally. Just as with information about a potential suicide, you should notify the administration as quickly as possible and allow them to begin the appropriate notifications and actions. Within the confines of available time, teachers and building-level administrators should involve the superintendent and the school lawyer. If notifying the administration is not practical, you should then take steps to immediately notify the police or a child protection agency.

## Sexual Activity

Students may also disclose information to an educator about their sexuality. This could include a disclosure that the student is thinking about becoming sexually active, is sexually active, is pregnant, is thinking about having an abortion, or has a venereal disease. Again the issue of whether to disclose, when to disclose, and to whom to disclose depends on the circumstances.

A Criminal Act

**A victim of a criminal act.** Your first concern is the degree to which the student is a victim of a criminal act. All states have set a legal minimum age of consent to sexual activity. That age is often 16 or 18 years of age. A child under that age may not legally consent to sexual activity, and it is a criminal act to have sex with that child, no matter how willing the child may be. When a student is under the age of consent and is sexually active, he or she is the victim of a criminal act. This is a matter of particular concern if the student's partner is an adult.

- If a 14-year-old child is having sex with a 22-year-old adult, the police must be notified. The child is the victim of a predator, and the adult has committed statutory rape, child molestation, sexual contact with a minor, sexual exploitation of a minor, or violation of a similar statute.
- If a couple has become sexually active over the course of their dating for two years, and one of them turns 18 while the other is still 17, whether you need to notify the police becomes a great deal

more problematic. Few police agencies will actively investigate, and few prosecutors will charge sexual activity between an 18-year-old and a 17-year-old who have dated for several years. To be totally safe, it would be advisable to request the school administration to seek informal guidance from the police or prosecutors. Informal guidance is necessary because elected or appointed governmental officials would not formally admit they do not look into this type of behavior.

- If the student is sexually active because he or she is being abused by a family member, notifying the family first would be dangerous. The police or a child protective agency should be notified first.

Pregnancy

**Pregnancy.** If a student indicates that she is pregnant and does not want her parents to find out, the practical limitations are obvious. Without a miscarriage or an abortion, there will eventually be a baby that will have to be explained and cared for. There have been a number of tragic situations documented in the news where unwanted teen pregnancies have been "handled" by allowing the baby to die or by killing the infant and discarding the body. Pregnancy is a time of serious health consequences for the mother and the baby. The health risk for very young mothers is great, as is the potential for harm to the baby through low birth weight or other problems that result from a lack of care during pregnancy. Given the threat of harm to the mother and child that these health risks pose, prenatal care should be sought immediately.

Your first step should be to encourage the young woman to tell her parents and to seek their help. It is appropriate to volunteer to help her tell them. Most important, you need to let the student know that if she does not tell her parents by a certain date (soon!), then you will have to notify them. Then give the girl and her parents information on the agencies that can help them choose how to handle the pregnancy—either terminating it with an abortion or carrying it to term and deciding whether the baby will be raised by the girl and her family or will be put up for adoption or placed

*Your first step should be to encourage the young woman to tell her parents and to seek their help.*

in state care. Encourage the girl and her parents to use the resources available during the pregnancy, including free or low-cost prenatal care.

What do you do if the girl says her parents will kill her, disown her, or kick her out of the house if they find out she is pregnant? Counsel with the young woman to see if this belief is well-founded or simply the natural reaction of a child who feels she has done something that will disappoint her parents. If there seems to be any significant danger the child would be harmed by the parents if they knew about the pregnancy, seek help for the child by contacting a child protective service.

## Criminal Activity

> *A crime does not have to occur during the school day or on campus before the school can exercise school discipline.*

A crime does not have to occur during the school day or on campus before the school can exercise school discipline. The courts have recognized the right to discipline students with suspension, expulsion, withdrawal of privileges, etc., for off-campus conduct that has a direct relationship to the school. Examples include:

- A student who leaves school, goes home, takes his parents' car, and plays "chicken" with a school bus loaded with students. His actions had a direct impact on the school because they endangered the lives of other students still under the school's jurisdiction.
- A student who receives an F on a test and slashes all four of the tires on her teacher's car the following Saturday night. This act of vandalism would not have occurred but for the relationship the teacher has with the student.
- Two students who meet at school and agree to meet off-campus after school to fight, sell drugs, or engage in other behavior that violates the student code of conduct. Many courts have recognized this school connection because the criminal activity was planned or initiated on school grounds.

Other student criminal activity may not have enough of a school connection to warrant school disciplinary action. If two students at the school happen to meet at a mall on a Saturday afternoon and decide to fight, buy drugs, or rob a store, these criminal acts would subject them to arrest, prosecution, a juvenile delinquency adjudication or an adult criminal conviction, and possible punishment. Although there would not be a sufficient nexus or school connection to also justify suspension or expulsion, there are still possible school ramifications.

*School personnel have a responsibility to society to report information about criminal activity that they are told about or overhear.*

The first is that school personnel have a responsibility to society to report information about criminal activity that they are told about or overhear. A staff member may overhear students bragging about their robbery of a convenience store over the weekend. A student could be seen with stolen property. (This would subject the student to possible discipline for possessing contraband on school grounds, even though the theft took place off school grounds.) The student rumor mill could be spreading the rumor that two seniors were involved in a liquor store robbery. Information of this kind should be reported to the police. It is not necessary that the evidence be of a type that is admissible in a court. Just receiving an investigative lead can often be enough to help the police find the information needed for a criminal indictment and conviction.

Another possible school ramification exists if the student is arrested and found to be delinquent or guilty of a criminal charge in adult court. The student may be placed on probation or released on parole after a period of incarceration. Because the student may return to school at this point, the school needs to be aware of any conditions of probation or parole to facilitate communication with the student's probation officer. If the student is incarcerated in a juvenile detention center, the juvenile ward of an adult prison, or an adult prison (if the student is over 18 years old), the student may still be eligible for educational opportunities. In addition, the corrections department is required to provide any special education services the student was receiving at school. This will require the school to transfer information about the student and his or her IEP to the student's school of residence. See Part 4 for more information on special education students.

# Conclusion

# Conclusion

Ensuring a safe learning environment for students and staff alike is not an easy task. Violence, gang activity, and sexual harassment are just a few of the problems that today's schools must address. An effort to protect our students and staff begins with a knowledge of the legal principles involved in school discipline and safety. This guide covers those principles and provides many proven strategies for minimizing disruption and legal liability. Although we recommend you use those strategies that are most appropriate for your situation, there are 10 steps every school should take.

1. Develop, communicate, and enforce a plan for discipline and safety.
2. Respect a student's right to due process when handling student misbehavior.
3. Document all activities concerning student misbehavior, including the discussion of school rules.
4. Determine whether misbehavior is related to a disability before disciplining a special education student.
5. Adopt and enforce a zero tolerance policy against harassment, including sexual, racial, ethnic, and religious harassment.
6. Respect a student's right to expression and association, but adopt and enforce reasonable rules that prohibit disruptive activity and appearance.

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7. Recognize and respond to early signs of violence, such as bullying behavior and vandalism.
8. Avoid physical contact with a violent student. If you cannot avoid contact, use reasonable force to counteract the aggression and seek help as soon as you can.
9. Report suspected abuse and neglect, and disclose any student comments that suggest the student may harm him- or herself or others.
10. Seek legal guidance on specific problems from your school or district attorney.

By following these 10 steps, you will minimize the possibility of legal liability and make your experiences with discipline and school safety more stress-free.

# APPENDICES

Appendix A The Legal System and Constitutional Rights

B Giving Testimony

C Receiving and Giving Gifts and Money

## Appendix

## A

# The Legal System and Constitutional Rights

To most educators, the legal system is a foreign land with strange and unusual customs and an even stranger language. Our explanation of the legal system and constitutional rights begins by clarifying what the legal system does not guarantee. It is important to recognize that we do not have a system of justice—our society operates on a system of laws. We cannot guarantee that a statute or court case makes sense, or is fair or just. We can, however, explain what the law says, what it means, and what has to be done because of it.

## The Legal System

Laws are created and enforced by the legislative, judicial, and executive branches of government.

**Legislative.** The legislative branch includes Congress, state legislatures, county boards, and city councils. These groups create statutes, municipal codes, and other laws and regulations. Criminal laws are almost always created by legislative action. Legislative action also provides broad guidelines for many other aspects of society. Examples include laws governing how school districts finance their operations and what powers and duties are granted to or imposed upon schools.

**Judicial.** The judicial branch is charged with enforcing the laws and with interpreting the statutes. In both civil and criminal settings, the courts are responsible for deciding whether statutes or regulations violate state constitutions or the United States Constitution. Through their decisions, the courts are also responsible for determining what statutes really mean.

The federal court system and the state court systems of 49 of our 50 states operate under common law. In a common law system, the court also creates laws in areas that are not addressed or have been incompletely addressed by legislative action. Much of civil law is court-created, including tort law (negligence) and contract law. Many of the legal principles that affect daily life cannot be found in the federal, state, or local statute books but are found by discerning the principles as they are applied in the decisions of thousands of court cases in states throughout the nation.

Executive

**Executive.** The laws created by the executive branch of government are referred to as administrative rules and regulations. These rules and regulations provide the details for meeting statutory requirements. For example, the legislature may pass a statute requiring each teacher in the public school system to have a teaching certificate. The administrative agency—the state's department of education—will then develop rules and regulations to define the requirements and to implement the statute's mandate. Most citizens interact with the law at this administrative level as they seek answers to questions concerning social security benefits, workers' compensation for on-the-job injuries, and other applications of laws and regulations.

## The School's "Legal System"

Schools also have legislative, executive (administrative), and judicial responsibilities that parallel those of the legal system. Most educators' experiences with legal issues will be at the administrative level. Like other administrative agencies, the school is entitled to adopt its own administrative rules, regulations, policies, and procedures to detail how statutory mandates will be accomplished. The legislature may give the school the power to suspend or expel students for misconduct. The governing board, school administration, and staff members then develop the policies and procedures that determine what constitutes misconduct; appropriate penalties for misconduct, including suspension or expulsion; and procedures for handling misconduct and discipline.

The school district also operates on a judicial level. Governing boards, administrators, school councils, and student courts have the responsibility, subject to appeal, to determine whether a student has committed acts or omissions that violate school rules and whether to impose discipline for those infractions.

## The Judicial Branch

The judicial branch is composed of local, state, and federal levels. In general, violations of laws and regulations are handled in the local jurisdiction in which the violation occurred, although some cases may be moved to another city or state in an effort to ensure a fair trial. Each level of the judicial branch is further divided into levels that handle various civil and criminal matters.

State Trial Courts

**State trial courts.** State courts have a trial court level, commonly known as superior court. The superior courts handle civil trials involving claims above a specified dollar amount and criminal trials that involve felonies or juvenile delinquency proceedings. Below the superior courts (and usually subject to superior court oversight) are the lower courts, justice of the peace courts, municipal (local) courts, and small-claims courts. These courts handle either criminal matters (misdemeanor trials or initial court proceedings such as preliminary hearings), civil matters below a specified dollar amount, or both. Actual trials and fact-finding, including the determination of guilt or innocence in criminal trials, and determination of judgments and amounts in civil trials, are almost exclusively the domain of these trial courts.

State Appellate Courts

**State appellate courts.** All state court systems have an appellate, or appeals, division. This usually involves an intermediate court of appeals and a court of ultimate jurisdiction for that state, commonly referred to as the supreme court. The purpose of an appellate court is to determine whether legal errors were made at the trial-court level. If there were errors, the appellate court then decides whether the errors were serious enough to warrant ordering a new trial or reversing the decision of the trial court. For the most part, the appellate courts limit themselves to reviewing legal issues and do not generally interfere with the factual determinations of the trial courts.

### Federal Trial Courts

**Federal trial courts.** The federal court system is structured along similar levels. Trial courts in the federal system are referred to as district courts. Every state has at least one federal district court and may have many more, depending on the state's population. Magistrates' courts are responsible for handling minor issues in the federal system. There are many complex rules that determine whether a case can be presented in federal court or state court. Put as simply as possible, you can sue or be sued in federal court only if the suit poses a federal question (an issue of federal law, involvement of the federal government, etc.) or if the parties live in or the incidents occurred in or involved different states (i.e., a resident of New York sues a resident of Nevada over an accident that occurred in Florida).

There are cases that can be tried only in state court, cases that can be tried only in federal court, and cases that can be tried in either but not both. Federal criminal cases are limited to federal crimes, although the same crime could violate both state and federal law. An example would be a killing that would be considered a murder under state law and a criminal deprivation of civil rights under federal law.

### Federal Appellate Courts

**Federal appellate courts.** The federal appellate system is divided into 11 circuits, or regions, referred to collectively as the federal circuit courts of appeal. Each circuit is in charge of appeals arising from the district courts in the states within its jurisdiction. A legal decision rendered in one circuit court of appeals may or may not be persuasive to another circuit court of appeals, but it is certainly not binding. A common reason for the United States Supreme Court to accept a case for review is to resolve legal differences between two or more circuit courts of appeal.

U.S. Supreme Court

**The United States Supreme Court.** Our nation's highest court of appeals is the United States Supreme Court. For those who threaten to "appeal all the way to the Supreme Court," the general response is "good luck and good health." Out of the millions of civil and criminal court cases filed in our justice courts, municipal courts, superior courts, and federal district courts each year, several hundred, at most, will ever be reviewed by the United States Supreme Court, and even fewer will be accepted for decision. Generally, years will have passed by the time the case clears the trial and subordinate appellate courts and is finally decided by the United States Supreme Court. Many, if not most, student discipline or student rights cases that reach the United States Supreme Court are decided after the student has graduated.

*Many, if not most, student discipline or student rights cases that reach the United States Supreme Court are decided after the student has graduated.*

The United States Supreme Court is responsible for providing legal guidance to all of the nation's subordinate courts in the interpretation of federal law and constitutional law. With the possible exception of death penalty cases, the Supreme Court accepts cases based on the importance, complexity, or confusion of the legal issues involved, not on whether a lower-court decision was right or wrong.

## Constitutional Rights

The clarion cry of almost everyone who feels they have been wronged by the action of any governmental entity (the police, school district, motor vehicle department, etc.) is that the action is unconstitutional and that it violates their "constitutional rights." What does this mean? Although a thorough answer would require a separate book, we can provide a general overview of the topic.

The United States has a constitution, and each state has a state constitution. A state supreme court's decision as to whether an action does or does not violate that state's constitution is binding on the federal courts within that state. A state supreme court's decision that some action does or does not violate the federal constitution is meaningless to the federal courts, even a federal magistrates' court, and applies only in the state courts, if at all. It is not unusual, however, that a state supreme court may invalidate a criminal conviction after it decides that a particular police action permitted under the United States Constitution is prohibited under that state's constitution.

*A constitution is a document that embodies the system of fundamental principles according to which a nation, state, corporation, or other entity is governed.*

What is a constitution? A constitution is a document that embodies the system of fundamental principles according to which a nation, state, corporation, or other entity is governed. A constitution is the legal foundation upon which all other statutes and court decisions are built and interpreted. Constitutions are created shortly after the creation of a nation or state. They are living documents that can be amended and are subject to differing interpretations based on fundamental changes in the society they protect.

An example of a drastic change in the interpretation of the United States Constitution that reflects the growth of our society is the Supreme Court decision, *Brown v. Board of Education* (1954). Before 1952, the constitution was interpreted as allowing states to treat people of different races differently in the provision of such basic governmental services as education. "Separate but equal" was the rule, although a review of the segregated schools showed schools were far more separate than they were equal. In *Brown v. Board of Education,* the United States Supreme Court unanimously held that the previous interpretation of the United States Constitution was wrong and that it required all citizens to be treated equally and consistently by the government, regardless of race or color. Thus, while the courts respect and follow the concept of legal precedent, all courts, including the United States Supreme Court, can determine that prior decisions are no longer a correct interpretation of the constitution.

The issue of constitutionality concerns whether a particular governmental action or law is at variance with the constitution. It is not a matter of the governmental action being unsound or incorrect. There is no "it just ain't right" theory of constitutional law. A governmental decision can be factually in error, be perceived as morally wrong by the person it concerns, or be at variance with the wishes of a majority of voters. These situations do not make an action unconstitutional. A statute or governmental action is only unconstitutional if it violates a fundamental principle in the constitution. For educators, the primary issues of constitutionality will arise in the context of providing adequate due process for students or staff.

## Seek Legal Guidance

There is no way that a single appendix or book could prepare you to handle the legal system. Although this appendix provides a general road map, you do not need to visit this strange land without a qualified guide. Seek legal guidance if you become involved with the legal system as an educator. Seek district approval to talk to your district's legal counsel, and talk to the attorneys provided by local, state, and national professional organizations. Talk to the members of organizations who are familiar with the issues you face. Talk to the prosecutor or police officer if you are called as a witness in a criminal or juvenile delinquency proceeding. Talk to the state's attorney or welfare workers if you are called as a witness in a dependency hearing. Seek a qualified legal guide if you must venture into the jungle of the law.

## Appendix B

# Giving Testimony

There are a variety of circumstances in which you, as an educator, may be asked to testify during legal or administrative proceedings. You could be a witness in a student disciplinary hearing and testify before your governing board or a hearing officer. You may be called as a witness in a juvenile delinquency proceeding or a child welfare hearing and testify before a judge or juvenile commissioner.

You may be called as a witness in an adult criminal trial involving an adult student or an intruder. You may testify in a civil proceeding in which you or the school is suing a student or his or her parents. You may testify in a civil proceeding in which the student and his or her parents are suing you and the school. You may also be called as a witness in cases where the parents are divorcing, engaged in a child custody dispute, or are suing another party over a matter in which your knowledge as the teacher or administrator is relevant. In these instances, your testimony will likely be before a jury of six, eight, or twelve of your peers.

In a society in which crime is common and civil litigation has increased dramatically, the odds of a teacher finishing a career without testifying in some type of official judicial or administrative hearing are not good. From personal experience, we can assure you it is always more fun to ask the questions than to be on the witness stand answering the questions. Being a witness is almost never pleasant, is often stressful, and, on the first occasion, is often terrifying. The fear of that initial testimony is the fear of the unknown.

Although there are no special strategies or tricks that will make testimony enjoyable, the following information will help demystify the process of testifying and eliminate the initial fear of the unknown. We can also give you two assurances: first, in a combined 38 years of legal experience and another 25 years of educational experience, we may have lost cases, but all of our witnesses emerged from the process breathing and capable of continuing their lives. Second, the alternative to testifying is much worse. If we, as educators, do not accept the responsibility to do what is right, moral, and legal—and take on a necessary, albeit unpleasant, task—the system begins to slip and we fail ourselves, our students, our schools, and our society.

## Witness Duty

Your duty as a witness is to tell the truth—to explain without exaggerating or minimizing what happened and to provide the information you have to the finder of fact. A witness can have no higher goal than to provide accurate, truthful, complete testimony. You are not in a position to worry about whether the information helps or hinders the school or helps or hinders the student. You are not required to make the final decision on whether to expel or imprison the student or whether to award damages to or against the school district. As a witness, your task is to answer the questions presented to you fully and honestly. There are two kinds of witnesses: the lay witness and the expert witness.

*A witness can have no higher goal than to provide accurate, truthful, complete testimony.*

### The Lay Witness

**The lay witness.** The most common kind of witness, the lay witness, testifies about something he or she observed or knows from personal knowledge. Normally, a lay witness is limited to testifying about matters that he or she personally saw, heard, or experienced. A witness may not be allowed to testify about what someone else told him or her because this would be "hearsay." Although reliable hearsay can be admitted in an administrative hearing, hearsay is not allowed in a judicial proceeding unless it fits into one of the 27 exceptions to the hearsay rule. Let your lawyer worry about whether testimony is hearsay and whether it is admissible.

As a teacher, you will most commonly be testifying about facts that an attorney will seek by asking questions, such as "Did the student approach you with a knife, screaming that he was going to kill you?" "Is the student receiving special education services?" "Did the student fail to turn in 29 of the last 30 assignments?" It is rare for lay witnesses to be asked to express their opinion on the case or any other matter.

The Expert Witness

**The expert witness.** The second type of witness is the expert witness. An expert witness is someone who is skilled in an art, trade, or profession or who has special information or expertise in a particular subject area that is relevant to the case. An expert witness is allowed to express opinions on any relevant issue that falls within the scope of his or her expertise. The expert witness is allowed to express opinions on causation and fault and to explain the logic, operation, practices, or procedures in a given situation or profession. An expert's knowledge about general practice can often be as important as his or her opinion about the specific facts of an individual case. The expert witness can help explain how and why things happen. Expert witnesses can explain the meaning of specialized terminology and explain scientific, technical, and professional issues.

As an educator, your testimony may take on a hybrid character as you are asked to give both lay and expert testimony. You may be called on to testify about the facts of a situation and then be asked to explain certain procedures or even give your professional opinion on an issue. This hybrid mix of testimony is especially common in a student disciplinary hearing or a child welfare proceeding.

## Working with Lawyers

Having to testify at a hearing or trial almost certainly means you will have to interact with attorneys. Although the attorney who represents you and/or your school district may or may not be your personal friend, this lawyer is certainly your guide through the jungle of testimony and, to the extent possible, your shield against attacks from attorneys of the opposing side.

The attorney who represents the student in a school disciplinary hearing, a juvenile delinquency hearing, or a civil lawsuit against the district is most certainly *not* your friend. This lawyer's job is to use your testimony and your knowledge to his or her client's benefit. This opposing lawyer has specialized training in the law and in techniques that can make your testimony as positive as possible for the lawyer's clients or to minimize the damage your appearance can cause to the client's case. Attorneys make their living with words and with the law. Every lawyer has his or her own technique or approach, and it is important not to be tricked into saying something you do not mean because of a lawyer's line of questioning.

You can prepare yourself for interactions with lawyers and the legal system by becoming familiar with lawyers and their strategies, understanding the importance of pretrial interviews, preparing for testimony, and using proven strategies for a successful stint on the witness stand.

Lawyers and Their Strategies

**Lawyers and their strategies.** Some attorneys are extremely amiable while they are questioning you. This does not mean that they are your buddies. They have discovered that this style will often disarm witnesses and cause them to drop their guard, making it easier for the witnesses to make statements that can be used later to the attorney's client's benefit. They also present themselves more effectively, particularly to juries, boards, and non-attorney hearing officers. As a general rule, highly competent opposing attorneys begin with a pleasant approach and only move on to an aggressive approach if they are not getting what they need out of a witness.

Some attorneys will deliberately try to make you angry, upset, or confused in the hopes that you will make a statement that can be used to their client's advantage later in the case. During the cross-examination, it is not unusual that your senses will be questioned, your memory will be doubted, your honor and honesty may be impugned, and your expertise will be questioned. While we cannot ask you not to be hurt by these techniques, please do not take them personally. However you handle these hostile techniques, do not allow them to affect your emotions. Anger, resentment, defensiveness, and loss of composure may be the opposing counsel's goal. Resist the temptation to strike back. Instead, remain calm, professional, and accurate.

Some attorneys are chronically disorganized. They flit like a butterfly from issue to issue, with little apparent rhyme or reason, until they catch you in a contradiction that they can use. At that time, their questions take on an almost scientific precision.

Other attorneys move rapidly and relentlessly down their list of questions and do not give you the opportunity to take a breath, let alone think about the nature of the questions.

Lawyers are not above using their linguistic skills to distort what you say as a witness. This technique is most often used near the end of your testimony when you are tired and looking forward to getting out of that chair.

Pretrial Interviews

**Pretrial interviews.** You may be questioned by opposing counsel before the hearing or the trial. Whether this questioning takes the form of informal interviews or formal depositions, its purpose is the same. The first and most legitimate purpose of these interviews and depositions is "discovery." There is little an attorney likes less than asking a question at trial to which he or she does not already know the answer. Opposing lawyers want to know what a witness is going to say so that they can prepare for defense by preparing their client and witnesses and by drafting more detailed questions for trial.

A second purpose for an interview or deposition is to lock you into statements that were made in a more informal and relaxed setting and can be used to impeach your testimony at the trial. Because you are not likely to be as apprehensive in an interview, you may not answer questions with as much detail or precision as you would during a trial. These imprecise answers can reappear in the cross-examination by opposing counsel with a statement like: "But didn't you tell me something different when I interviewed you in the school office on January 15, 1998?"

Always remember that an interview or deposition with opposing counsel is a fishing expedition—do not bait their hooks for them. Do not volunteer information. Answer their questions as though you were on the witness stand.

## Preparing for Testimony

There are many things you can do to prepare for testimony. You can approach the witness stand with confidence when you study and use the strategies listed below:

Meet with the School Attorney

**Insist on meeting with the school's attorney before the hearing or trial.** Ask the attorney to explain procedures, review the questions he or she plans to ask you, and discuss the questions opposing counsel may ask. Prepare your answers, but do not script them so that you end up sounding mechanical.

Always make sure your attorney knows everything that you know about the incident, regardless of whether it seems good, bad, or insignificant. If your attorney knows about a problem, he or she can work to fix, defuse, or minimize it. But if your lawyer first becomes aware of the problem when you answer a cross-examination question in a trial, you have introduced an unwelcome and potentially damaging surprise into your lawyer's strategy for handling the case. If there is a weakness in your case or a skeleton in your closet, tell your lawyer beforehand or, at the very least, mention it during direct examination by your lawyer. Follow this advice and you will avoid or minimize the opponent's opportunity to use the problem to attack you or undermine your testimony in cross-examination.

Refresh Your Memory

**Refresh your memory of the incident.** Rereading any reports or documents you prepared on the incident will bring the details back into your active memory. In Part 3, Documentation, we urged you to sit down as soon as possible after an incident and record the details in written form. This is the time when taking our advice on documentation will benefit you (and the case) immensely.

Rest and Eat Well

**Get a good night's sleep and eat a good breakfast** (low fat, low sugar) **before your testimony.** Do not drink alcohol for at least 24 hours before your testimony. If you take any medications that could affect your testimony, make sure your attorney knows about them.

Dress for Business

**Dress for business.** You want to make an impression as a serious, thoughtful, careful professional. Whether or not it is fair, people perceive a sloppy dresser as someone who is also careless in the details of his or her testimony.

Leave Early

**Leave early for your scheduled testimony.** Little can fluster a witness more than not being able to find a parking space at 9:55 A.M. for a 10:00 A.M. hearing. Flat tires are an inconvenience if you allow yourself an extra hour. They are a tragedy if you are running late. Having time to calmly compose yourself is much more satisfying than having to rush directly into court, out of breath, windblown, and disorganized.

Leave Supporters Outside

**Leave friends or family members outside.** Bringing a friend or family member as moral support can be beneficial, but leave them outside the hearing room. Do not bring a cheering section to watch the fun. Do not do anything that could detract from your image as a professional.

Be Attentive

**Be attentive when waiting to give your testimony.** When you arrive early, you probably will be excluded from the hearing room until it is time for you to testify. If you are allowed to sit in the hearing room before your testimony, be attentive and look respectful. Do not read, chew gum, talk, or sleep. Be aware that the governing board, jury, hearing officer, or judge is forming an opinion about you even before you start your testimony.

Keep Your Counsel

**Do not talk about the case** in hallways, restrooms, or anywhere you might be overheard.

## On the Witness Stand

Now that you have refreshed your memory of the incident and presented yourself as a professional by arriving early, being attentive, and keeping your counsel, you are ready to take the witness stand. What should you expect, and how should you conduct yourself?

Understand the Oath

**Understand the oath.** Between *Perry Mason* and *L.A. Law* reruns, most of us are familiar with the "oath": "Do you swear to tell the truth, the whole truth and nothing but the truth, so help you, God?" As an educator who has probably listened to thousands of student excuses, you can understand the importance of the comprehensive nature of the oath. A statement that is true but does not include important details can become the most effective lie. A statement that contains truth but also has information that is not truthful is a misleading statement. As a witness, you are not allowed to leave out the "little details" that provide the full picture of the incident.

Beware of Yes-or-No Questions

**Answer yes-or-no questions with care.** Although you are required to tell the whole truth, you can expect that opposing attorneys, as advocates for a certain position, will attempt to limit the "whole truth" if it is detrimental to their client. We are all familiar with the classic rhetorical question: "Are you still beating your students? Answer yes or no." Asking a question and demanding a yes-or-no answer is a common legal technique.

Many questions cannot accurately and honestly be answered with a simple yes or no. If this is the case, begin by explaining that a simple yes-or-no answer would be misleading and ask for permission to explain your answer. If the opposing counsel demands a yes-or-no answer, the jury, judge, hearing officer, or governing board will recognize that something is missing and your attorney, in his or her redirect examination, can ask you to provide the details that the opposing counsel did not want to be heard. Do not become argumentative with the opposing counsel. Once you have made your limiting statement, go ahead and answer the question as accurately as you can.

Be Attentive, Respectful, Calm

**Be attentive, respectful, and calm.** Your bearing, gestures, and tone of voice are important. Sarcasm, belligerence, and loss of composure help your opponent, not you. Do not argue or become angry with the opposing attorney. This loss of control can lead to careless answers and will make a bad impression. Be confident and self-assured, but not arrogant.

Maintain Good Posture

**Maintain good posture and lean slightly forward** in the witness chair. Try to keep your hands on the armrest or in your lap, and do not use nervous gestures. When giving answers—especially if they are long, detailed answers—look at the jury, the governing board, the hearing officer, or the judge. They are the ones you have to convince, not the opposing counsel. Do not look at your counsel as if you are seeking guidance in your answer.

Use Teaching Techniques

**Use your best teaching technique to explain your answers.** Do not talk down to the judge, jury, or hearing officer. Be frank and open with them, using simple terms and maintaining effective eye contact. If they seem to be confused, try to clarify and explain. If you use technical jargon, be sure to explain the terms you use. Try to avoid using buzzwords and, where appropriate, use analogies to explain difficult details. Do not equivocate—be direct in your answers.

Avoid Talking in a Monotone

**Avoid talking in a monotone.** Change the tone, pitch, volume, and speed of your voice. If the jury members, board, or hearing officer appear to be furiously taking notes, slow down. You do not win any race if you finish before the jury does. Use powerful, detailed, accurate statements, and avoid generalities. If you are estimating something like distance or time, state that it is an estimate. Speak in complete sentences and answer yes or no. A court reporter cannot record a nod of the head.

Formally Address Others

**Formally address the parties in the trial by their titles and last names** (e.g., Mr. Jones, Ms. Smith, Dr. Johnson, Your Honor).

Be Professional

**Become even more of a professional** if the opposing counsel becomes abusive or aggressive. Answer questions in a calm, respectful, and accurate manner.

Remember, you do not have to be perfect. Neither you nor your testimony has to be movie script perfect. If you honestly do not remember a detail, it is acceptable to indicate that you do not know or do not recall the answer. On cross-examination, limit your answer to the question asked. Do not volunteer information. Open-ended questions like

"What happened next?" are wonderful if asked by your attorney, but should be answered with caution if asked by the opposing counsel. If the information needs to be revealed, your attorney will ask about it. If you do make a mistake in your testimony, correct it as soon as possible.

Always Tell the Truth

**Always tell the truth, no matter how you think it may be used against you.** A common trick among attorneys is to ask a witness, "Have you discussed your testimony with the attorney for the school district?" This question implies that there is something wrong with this. Tell the truth. Of course, you discussed your testimony with the attorney for the school district. What type of foolish person is going to call you as a witness if he or she does not know what you are going to say? The appropriate answer is, "Yes, of course, we reviewed the facts before this hearing." You may also be asked, "What did your attorney tell you to say?" This implies that the attorney has created your testimony for you. The appropriate answer is the truthful one: "My attorney told me to tell the truth."

Listen before You Answer

**Listen to the question before you answer it.** The pause allows you to formulate your answer and gives your attorney time to object if the question is improper. If you hear your attorney start to speak, be quiet. There will always be time to answer after the objection. If you answer before the judge rules on the objection, you have decided the issue of admissibility, not the judge. By objecting, your attorney may also be trying to alert you to a need to be particularly careful about the question or its phrasing.

Ask for a Rephrased Question

**Do not hesitate to ask that the question be rephrased** if it is vague or ambiguous. Make sure you understand all of the terms used in the question. Ask to have unfamiliar words defined so that you have the same understanding of their meanings as the person who is questioning you. If a question is ambiguous, make your answer specific and clear. For example: "If you mean X by your question, then yes, the answer is Y." You may consider including the question in your answer.

Ask to have a compound question rephrased so you can answer one question at a time. Be wary of questions with the words "or" and "and." Be particularly careful of negative questions which start with the phrase, "Is it not true that . . . ." Be alert to leading questions, which involve the opposing attorney giving you a question that you only have to agree with. If any part of the question is incorrect, then indicate that you cannot completely agree with the statement contained in the question.

Listen to a Summary with Care

**If the opposing attorney summarizes your testimony, be careful that he or she does not attempt to put words in your mouth** by suggesting things you did not say. Do not accept a characterization of assumptions, events, descriptions, or data that is not totally accurate. Point out every inaccurate statement in the summary.

Be Careful of Catch-All Questions

**Be careful of catch-all questions,** such as "Tell me everything you know about this event." If you remember a new detail later on, the opposing counsel will try to claim that you made up the detail or that you lied when you did not include it in your answer to the "tell me everything" question. Cover yourself by beginning with a question—"Could you be a little more specific?"—and by ending with a statement—"That is all I can think of at this moment."

Study Documents before You Identify

**Make sure you know what a document is before you identify it.** If you are handed a document and asked to identify it, take it and read it carefully before you respond. You could mistake it for a different document if you simply give it a casual glance. Refer to documents by name or number. Do not just point to a document.

Identify Quotes and Paraphrases

**When relating a conversation, indicate whether you are quoting word-for-word or whether you are paraphrasing.** Examples of how to phrase quotes and paraphrases include:

- "The student's words were so unusual that they stuck with me. The student said, 'The dog next door ordered me to kill you,' as she approached me with a large knife."
- "I specifically remember that the student called me by name and apologized after attacking me. He said,

'I'm sorry, Mrs. Jones, but I had to hit you in order to get into the gang. Please don't take it personal.'"

- "I do not remember the exact words the student used when he attacked me, but I do remember his screaming that the math grade I gave him had kept him off the football team."

### Be Honest and Candid

**Avoid using expressions like "honestly," "in all candor," "to tell the truth," and "I'm doing the best that I can."** Simply be honest and candid. Do not make it sound like it is unusual for you to tell the truth—and that you are just making a special effort for this trial or hearing.

### Avoid Inappropriate Language

**Avoid using inappropriate language, obscenities, profanities, vulgarities, or racial slurs unless you are quoting** what occurred during the incident. Avoid attempts at humor—they will often backfire and seldom positively influence the judge, jury, or hearing officer. Snide comments take on a life of their own and can seriously undermine your credibility.

In conclusion, testifying is rarely an enjoyable experience. You can, however, perform a useful function for yourself, your students, your school, and your community by testifying truthfully and effectively. You can also minimize the stress of testifying by preparing adequately and participating in a calm and professional manner.

## Appendix C

# Receiving and Giving Gifts and Money

While the problems associated with receiving or giving gifts or money are not as significant as the problem of weapons on campus, they do constitute a more common situation that can become a legal morass for the teacher. Improper handling of a situation involving gifts can create misunderstandings and hard feelings among students and parents and could even lead to the possible loss of a teacher's job and teaching certificate. The four case studies in this appendix discuss these problems and provide strategies for preventing them.

## Gifts from Students and Parents

**When, if ever, is it appropriate to accept a gift from a student or parents? The parents of a student want to pay me money because of the special help I gave their child. Is it appropriate to accept this money? I offer a tutoring service. Is it appropriate to tutor one of my own classroom students for a fee?**

Teachers, police officers, and the clergy are the three greatest groups of moonlighters in the employment universe. No part-time job is more natural for a teacher than teaching. Teachers make excellent tutors. When given the luxury of a one-on-one situation, teachers can help students make magnificent strides in a very short period of time. Tutoring services can be paid for by the school itself

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*Tutoring your students for pay presents two problems:*

1. *A professional conflict of interest.*
2. *Appearance of preference.*

or through grants processed through the school. Outside agencies, such as juvenile detention centers, boys and girls clubs, private foundations, private educational businesses, and social welfare agencies, also employ full-time teachers as part-time tutors. Parents are often eager to pay a teacher to tutor their children in areas of special need or talent. All of these extracurricular teaching opportunities are legitimate opportunities to earn extra income while benefiting society.

There is nothing improper about a teacher providing private tutoring lessons to an individual student, with payment coming from the child's parents. The conflict arises when the student is one of your regular students. This presents a professional conflict of interest. Your full-time job is to teach this student along with his or her classmates. As the student's teacher, you use all of the skills and resources available to you to give this student the best education that you can. You also must share your attentions with 20 to 30 other students.

Another problem is preference: intentional, unintentional, and perceived. It is human nature to feel more kindly toward people who make our life easier. Extra income makes our lives easier, and there is a tendency, consciously or subconsciously, to express favor in class toward a student whose parents are paying you for special attention outside of class. Even if you are one of the exceptional people who could completely overcome this natural reaction, there may be a perception by the other students, the parents of the other students, and the administration that preferences are being granted. The situation can cause resentment from the parents of your other students, who may begin to wonder if they need to pay you to get special attention for their children. The easiest way to address these natural, but undesirable, perceptions is to tutor for pay only students who are not in your classroom.

In a similar way, accepting expensive gifts, particularly monetary gifts, from parents or students also creates a perception of preference or obligation. Teachers always get gifts from their students. As long as the gifts are only of a

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nominal value, they are a natural expression of student affection, and their rejection would be perceived as a rejection of the student.

In general, the greater the monetary value of the gift, the more cautious you should be in accepting it. A gift of cash should usually be avoided, especially if it is offered in thanks for special assistance provided to one of your students. Nominal gifts around religious holidays such as Christmas, Hanukkah, or Ramadan are acceptable. Children expect to receive gifts and like to give gifts in return. Similarly, accepting nominal gifts around secular holidays such as Valentine's Day is appropriate. If a gift comes at the end of a relationship—at the end of a school year or with graduation—a slightly larger gift could be accepted with grace and little concern for misperceptions. A gift accepted immediately before a final exam is problematic.

*In general, the greater the monetary value of the gift, the more cautious you should be in accepting it.*

Our major concern is to avoid the perception of buying preference or the expectation of rewards other than our salary and the affection and success of our students.

## Gifts to Students

**I would like to give a gift to each of my students to celebrate the end of the school year or for Valentine's Day. I would like to give a gift to a particular student in appreciation of the extra work he or she did. I would like to give a gift to an individual student because I am particularly fond of him or her. Are these actions appropriate?**

Yes, maybe, and under no circumstances.

The giving and receiving of gifts is a normal expression of human affection. As an educator, your actions in giving gifts to and receiving gifts from students and their families must be governed by the need to avoid misunderstandings and misperceptions by the student and family, other students and their families, and the school administration and public.

Gifts of nominal value that are given equally to all students under your educational guidance are almost always appropriate. A small bundle of candy to start the school year, a Valentine's card in February, or a noisemaker before the New Year's break are certainly going to be well-received by the students and will cause no legitimate concern to anyone who is aware of the gift. Consider the following guidelines for giving gifts:

### Guidelines for Giving Gifts

- Make appropriate alterations based on student health needs or family preferences. If you know that a student is diabetic or that his or her family does not approve of snacking, try to provide an alternative nonfood gift of equal value.
- Gifts should be age-appropriate and noncontroversial. A gift of a demonic-looking action figure might be a great hit with the kids, but could greatly upset parents and members of the community.
- Avoid gifts that have religious or political overtones. These include not only copies of the Bible, the Koran, or political pamphlets, but also pins or stickers with a religious motif or Christmas ornaments. If giving gifts near Christmas, avoid referring to them as Christmas gifts. Not all of your students will be Christian. Instead, refer to them as winter break gifts or make some other religion-neutral designation.

A more delicate area is giving gifts that are not given equally to every student. Rewards are a legitimate motivation tool. Some rewards are group-oriented and rely on peer pressure to modify student behavior. Offering a popcorn party on Friday afternoon if no student receives over two disciplinary check marks during the school week can be beneficial to both discipline and student morale. Other rewards may be more individualistic. For example, the teacher might give a sticker to every student who spells nine out of ten words correctly on the weekly spelling quiz. The teacher might give out a "student of the month" award to the student who has the least number of disciplinary check marks during the month or the student who has the highest grades for the month.

If offering individual rewards, consider the following advice:

## Guidelines for Giving Rewards

- The reward must be nominal.
- The rules for achieving the award must be clear and clearly communicated to the students.
- Every student must have an equal opportunity to earn the award. If you are going to give awards that focus on achievement, we recommend that you choose awards that reward for effort as well as for natural talent. A reward for musical achievement might be out of reach for a tone-deaf child.
- In addition to awards for the highest grade, best essay, and highest spelling score, consider rewards for the most books read, the greatest degree of improvement, completing the most extra assignments, or being the most helpful student in class.
- Under no circumstances should you reward a student for what they *are* rather than what they *have done*. A reward for the "cutest kid in the class" can be devastating for the other children.

## The Dangers of Giving Individual Gifts

There are compelling reasons to avoid giving gifts to particular students based on fondness or on other criteria that are not objective and communicated beforehand. At best, giving an individual gift that is not an award for specific achievement indicates personal preference, branding the child as a "teacher's pet" and proving that the teacher has favorites. At worst, these gifts can be tools used by predators to pick, befriend, and victimize their targets.

We have to be honest and admit the existence of adults who seek out and victimize children sexually and otherwise. Pedophiles go where the children are. They do not want to work in a nursing home. They become teachers, scout leaders, Sunday school teachers, Little League baseball coaches, and day-care workers.

In addition, other adults who are not interested in sexually abusing a child may use gifts in an effort to damage the relationship between a parent and a child and substitute themselves into a special, inappropriately close bond with the child. This strange attachment goes well beyond the normal affection of a teacher for his or her students, and goes beyond a concern that a child's home environment may be unhealthy. Thankfully, both types of troubled adults are rare, but they do exist.

One of the techniques these predators use to gain a child's trust is to give the child gifts and special attention. The gifts may be small initially, but they are personal in nature because they are given only to the intended victim. We need to create a school environment that denies these victimizers their protective camouflage. If teachers commonly give small gifts to individual students, the actions of the predator will not stand out as unusual and worthy of special attention. Similarly, when the predator is confronted, he or she can say, "I was just doing what other teachers do. There is nothing wrong in what I am doing." By following the above guidelines for giving gifts, we can create an educational environment in which inappropriate gift-giving by predatory adults will stand out and draw attention to the dangerous situation.

*If teachers commonly give small gifts to individual students, the actions of the predator will not stand out as unusual and worthy of special attention.*

## Giving Money to Students

**One of my students does not have money for lunch today. Another student does not have money for our field trip. When is it appropriate for me to lend or give money to a student?**

Never.

Do not give or lend money directly to a student. The possibility for misunderstanding your action is simply too great. In addition, doing so would provide protective "cover" for predators who use gifts of money to get close to their victims.

Your school should have a plan for helping students who forget their lunch money. Some schools have an alternative lunch for those students. Instead of the regular meal, students are given a peanut butter sandwich and a carton of milk. Other schools set up a revolving fund to handle these small emergencies. If your school does not have a formal plan for handling the problem of forgotten lunch money, suggest that it adopt one. If a plan that uses school money is not economically viable, consider setting up a kitty in which faculty and staff can pool funds to be used for forgotten lunch money and then reimbursed. Such a plan must be implemented with the full knowledge and approval of the school administration and must then be carefully monitored.

If a student regularly or routinely "forgets" his or her lunch money, there may be an underlying problem that needs to be addressed. Check with the parents to determine whether the lunch money is left at home or whether it disappears between home and school. The student may be spending the money on candy, comic books, or contraband rather than on school lunch. An older child or an adult may be extorting the student's money in exchange for "protection." If the money regularly disappears on the student's way to school, this problem should be examined and, if possible, remedied.

*If a student regularly or routinely "forgets" his or her lunch money, there may be an underlying problem that needs to be addressed.*

If a student regularly does not have lunch money, the problem may also be family economics. Notify the appropriate administrator about the situation so that he or she can explore whether the student's family economic situation qualifies the student for free or reduced lunch and breakfast programs. A regular absence of lunch money (or of a sack lunch brought from home) may indicate other problems. Does the student eat his or her lunch on the way to school? This is a situation to be resolved by the parent and child. Does the student not have lunch money because a parent is spending it on alcohol? This potentially abusive situation must be reported to the appropriate agency. Does the student not eat lunch because of personal preference or due to a loss of appetite caused by prescribed medication? If the family is aware of the situation and the student is gaining adequate nourishment from his or her other meals, this situation should be resolved by the parent and child.

School-sponsored field trips should not have a direct economic cost to the student. If the field trip is educational, school-sponsored, and curricular, the school should pay the entire cost. Sometimes schools will allow students to bring funds for a memento or a snack. Some parents may not provide these funds if they do not want their child to have an extra cookie or buy a brass model of the Lincoln Monument. Do not interfere with this family decision by lending or giving money to the student.

In conclusion, you should never lend or give money directly to a student for any reason.

## Handling Student Money

**I am responsible for handling student money for lunches, book club funds, student activity accounts, etc. How should I handle these funds?**

As briefly and as formally as possible.

### Collect Funds Promptly

Schools regularly have occasions in which students bring money to school or raise money for special purposes. To the maximum extent possible, the classroom teacher should not handle the money gathered from these activities.

Issuing weekly or monthly lunch tickets will reduce the number of lunch money interactions. If your school asks teachers to collect lunch money, request that someone from the school office come by each classroom to collect these funds promptly and take them to the school office or cafeteria office for recording, processing, and safekeeping. When you reduce the time you retain the money, you reduce the opportunity for it to be lost, stolen, or become troublesome in other ways. The same advice applies for money collected for activities such as book clubs, in which students bring money to order books or other items. Give the funds as quickly as possible to the school personnel who are responsible for handling school or student monies.

One of the most effective strategies for preventing theft is ensuring a lack of opportunity. Do not routinely store money—school, student, or personal—in your classroom. Do not leave your purse or wallet in an open, unlocked area. Do not tempt students by making one student responsible for receiving, accounting for, or transporting student or school funds.

**Keep Accurate Records**

Keep strict, timely, and accurate records of any student or school money that you handle. Record how much you received; how much you transferred to another staff member, account, or location; and how much you disbursed. Record who you gave the funds to and/or where you deposited or placed them (i.e., in a bank account or in a school safe). Never be the person responsible for both acquiring the funds and disbursing the funds. For good reason, standard accounting practices require that no one person be responsible for all aspects of cash management.

**Never Borrow Funds**

Never borrow from student funds. If you do not have your own lunch money, never borrow money from a student account or fund and never borrow it from a student. Instead, borrow money from a fellow staff member, go to the bank, or go hungry. Dipping into school or student funds can have serious professional and legal consequences. Once such dipping begins, it can become all too easy to borrow a bit more here and there until a person has borrowed his or her way into serious trouble. We are aware of one such situation which began with the reasoning that "I'll borrow five dollars and return it after payday" and turned into $30,000 in missing student activity funds and a long prison sentence.

**Separate Personal and School Funds**

Always keep a strict delineation between your personal funds and any school or student funds you handle. Do not put student funds in your wallet. Do not put your money into a container with student or school funds. Keep different school funds in separate envelopes or containers.

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Attorneys locate which cases they want to examine by looking through the regional and federal digests. Digests contain summaries of the main points of a case organized by categories such as "Contracts" or "Schools" and then subcategories such as "Schools—Student Discipline."

A law school library will almost certainly have copies of every regional reporter and digest, as well as all of the federal reporters and digests, including the various United States Supreme Court reporters.

The state capital will usually have a comprehensive law library for its supreme and appellate courts and legislature. Each county will likely have a county law library that will contain the regional and federal reporters and digests. Local attorneys will usually have the digest and reporters from their own region.

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